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No.

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1986

AUTOMATIC MUSIC AND VENDING CORPORATION, an Ohio Corporation, and FRATERNAL ORDER OF EAGLES, SANFORD AERIE, #3677,

Appellants,

v

MICHIGAN LIQUOR CONTROL COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1.

IS A STATUTORY CLASSIFICATION BASED ON THE NUMBER OF REPLAYS GIVEN ON AN AMUSEMENT DEVICE UNCONSTITUTIONAL WHEN THE RECORD BELOW CONTAINS NO EVIDENCE THAT THIS CLASSIFICATION BEARS ANY RELATION TO THE STATUTORY INTENT OF PROHIBITING GAMBLING?

2.

IS A STATUTE WHICH DEFINES A GAMBLING DEVICE AS A "GAME OF SKILL OR CHANCE, OR GAME PARTLY OF SKILL AND PARTLY OF CHANCE, USED FOR GAMING" SUFFICIENT TO PLACE ONE ON NOTICE THAT A VIDEO GAME GIVING FREE REPLAYS IS PROHIBITED?

Automatic Music and Vending Corporation does not have any parent corporations, nor does it have any subsidiary or affiliated corporations related to it.

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NO.

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Appellants,

v

MICHIGAN LIQUOR CONTROL COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

AUTOMATIC MUSIC AND VENDING CORPORATION and FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677 appeal from the final judgment of the Supreme Court of Michigan, entered on November 24, 1986, holding that MCL 750.303(2); MSA 28.535(2), on its face and as applied in the case at bar, was not unconstitutional as being violative of Appellants' rights to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The Opinion of the Supreme Court of Michigan, which appears in the Appendix hereto, p. A-1, *infra*, is reported at 426 Mich. 452, 396 N.W.2d 204 (1986).

The Opinion of the Michigan Court of Appeals, which appears in the Appendix hereto, p. B-1, *infra*, is reported at 141 Mich. App. 458, 367 N.W.2d 413 (1985).

The Order of the Ingham County Circuit Court, State of Michigan, dated June 3, 1983, is not reported. It is reprinted in the Appendix hereto, p. C-1.

The Opinion of the Ingham County Circuit Court, State of Michigan, dated May 18, 1983, is not reported. It is reprinted in the Appendix hereto, p. D-1.

The Order of the Michigan Liquor Control Commission Appeal Board, dated January 19, 1983, is not reported. It is reprinted in the Appendix hereto, p. E-1.

The Opinion and Order of the Michigan Liquor Control Commission Hearing Commissioner, including findings of fact and conclusions of law, dated December 1, 1982, is not reported. It is reprinted in the Appendix hereto, p. F-1.

JURISDICTION

The final judgment of the Supreme Court of Michigan, reversing the judgment of the Michigan Court of Appeals and holding that a section of the Michigan Penal Code, MCL 750.303(2); MSA 28.535(2), was not unconstitutional as being violative of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, was entered on November 24, 1986. See p. A-1, *infra*.

A Notice of Appeal to this Court was timely filed in the Supreme Court of Michigan on January 27, 1987.

This appeal is being docketed in this Court within ninety (90) days from the entry of judgment by the Supreme Court of Michigan. The jurisdiction of the Supreme Court to hear this appeal is invoked pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fourteenth Amendment, United States Constitution:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCL 750.303; MSA 28.535:

(1) A person who for hire, gain, or reward, keeps or maintains a gaming room, gaming table, game of skill or chance, or game partly of skill and partly of chance, used for gaming, or who permits a gaming room, or gaming table, or game to be kept, maintained, or played on premises occupied or controlled by the person, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or a fine of not more than $1,000.00. A person who aids, assists, or abets in the keeping or maintaining of a gaming room, gaming table, or game, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or a fine of not more than $1,000.00.

(2) This section shall not apply to a mechanical amusement device which may through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost if the mechanical amusement device is not allowed to accumulate more than 15 replays at 1 time; the device is designed so the accumulated free replays may only be discharged by reactivating the device for 1 additional play for each

accumulated free replay; and the device makes no permanent record directly or indirectly of the free replays awarded.

1980 AACS, R 436.1013:

(1) A licensee shall not allow unlawful gambling on the licensed premises.

(2) A licensee shall not allow any gambling devices on the licensed premises which are prohibited by the statutes of this state.

HOW THE FEDERAL QUESTIONS WERE RAISED

This case involves a provision of the Michigan Penal Code relating to the prohibition of gambling. MCL 750.303(2); MSA 28.535(2) creates an exemption for certain amusement devices. Any machines satisfying the criteria in MCL 750.303(2); MSA 28.535(2) is automatically precluded from consideration as a gambling device. If a machine does not come within the exemption in MCL 750.303(2); MSA 28.535(2), the determination of whether it is a gambling device is governed by the definitions in MCL 750.303(1); MSA 28.535(1).

The exemption contained in MCL 750.303(2); MSA 28.535(2) contains a classification relating to the number of replays given by a mechanical amusement device. Under Michigan law, a machine giving fewer than fifteen replays, and satisfying the other criteria in this statutory provision, is exempted from being a gambling device, while games giving more than fifteen replays must be scrutinized under MCL 750.303(1); MSA 28.535(1). Appellants acknowledge that prohibition of gambling is a valid public purpose. However, the classification in this statutory provision relating to the number of replays on a video machine bears no relation to this purpose. There is nothing in the record below that establishes a link between the statutory purpose and the classification regarding the number of replays on a video game. Absent such a relationship, the exemption contained in MCL 750.303(2); MSA 28.535(2) violates the Equal Protection

Clause of the United States Constitution. Moreover, the definition of a gambling device in MCL 750.303(1); MSA 28.535(1) is so vague as to violate due process guarantees.

The constitutional issues were initially raised at the administrative hearing level in Appellants' Brief filed with the Michigan Liquor Control Commission on November 9, 1982. CR, p. 299[1]. This brief was submitted to the Michigan Liquor Control Commission Hearing Commissioner Andrew Metcalf, and was Appellants' first opportunity to raise this issue. The Michigan Liquor Control Commission refused to rule on the constitutional issues raised by Appellants, holding that under Michigan law administrative agencies are not empowered to decide the constitutionality of a particular statute. See *Dation v. Ford Motor Co.*, 314 Mich. 152, 22 N.W.2d 252 (1946).

The federal questions were also raised in Appellants' Complaint filed in the Ingham County Circuit Court, Lansing, Michigan, on January 28, 1983. The Ingham County Circuit Court did not reach the constitutional issues presented in Appellants' Complaint, as its decision was based upon a state law issue and was favorable to Appellants.

The equal protection and due process claims were also presented to the Michigan Court of Appeals. *The Michigan Court of Appeals held that the provisions at issue violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, as well as the counterpart found in the Michigan Constitution. The Michigan Court of Appeals also held that this law violated due process, as its terms were unduly vague.* The Michigan Court of Appeals did not specify precisely which constitution it relied upon in deciding the due process issue. However, as the due process argument was briefed with reference to both the United States Constitution and the Michigan Constitution, it can be

[1] All transcript citations refer to the Certified Record of the Liquor Control Commission filed in the Ingham County Circuit Court on March 4, 1983.

presumed that the Michigan Court of Appeals rested its decision on the federal constitutional provision. See *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983).

The federal constitutional questions were also presented to the Supreme Court of Michigan. The Supreme Court of Michigan rejected the equal protection challenge to MCL 750.303(2); MSA 28.535(2), thereby reversing the decision of the Michigan Court of Appeals. The Supreme Court of Michigan cited the United States Constitution, as well as its Michigan counterpart, in rendering its decision. See p. A-8.

The Supreme Court of Michigan also considered and rejected the due process challenge to MCL 750.303(2); MSA 28.535(2). The Supreme Court of Michigan did not delineate which particular constitution it relied upon in reaching its decision. The due process issue was briefed by both parties with reference to the United States and Michigan Constitutions. Accordingly, it is presumed that the decision rested upon federal constitutional grounds. See *Michigan v. Long*, *supra*.

The federal constitutional claims were properly presented at every level of the proceedings in this matter. These issues were addressed in the decisions of the Michigan Court of Appeals and Supreme Court of Michigan.

STATEMENT OF THE CASE

The Appellant, AUTOMATIC MUSIC & VENDING CORPORATION, is an Ohio corporation engaged in marketing various coin operated amusement devices. Appellant, FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677, a licensee of the Michigan Liquor Control Commission, kept and maintained a video poker machine owned by AUTOMATIC MUSIC & VENDING CORPORATION on its premises in Sanford, Michigan.

The device that is the subject of this litigation is a "Draw Poker" machine. This machine is typical of many amusement games currently in operation throughout the United States. A quarter is inserted into the machine which then displays five randomly selected cards on a video screen. The cards are similar to those found in an ordinary deck of playing cards. Depending upon the hand the player is dealt, he has the option of discarding any number of cards displayed on the video screen and receiving new, randomly selected cards. If the player fails to achieve a "winning" hand, the player must insert another quarter in order to operate the amusement device again. If a player achieves a "winning" hand, he is rewarded by an opportunity to replay the amusement device at no additional cost. The amount of opportunities to replay the amusement device at no additional cost is based upon the value of the card hand dealt, in accordance with the rules regarding the card game "draw poker." This video game is incapable of rewarding a player with money or other tangible things of value.

Each "Draw Poker" machine is also equipped with a key mechanism used to discharge accumulated replays, and meters designed to track the number of quarters inserted and the number of replays discharged. The key mechanism is designed to prevent people from operating the device without inserting a quarter, in the event that other players walk away without using the accumulated replays. Further, the counters were installed to allow the owner to determine the profitability of the amusement device, and for gathering statistical information.

On March 30, 1982, Michigan Liquor Control Commission investigators Donald French and Julie Wendt entered the premises of Appellant, FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677. Investigator French then proceeded to operate Appellant, AUTOMATIC MUSIC AND VENDING CORPORATION'S, "Draw Poker" machine located on the premises of Appellant, FRATERNAL ORDER OF

EAGLES, SANFORD AERIE #3677. After accumulating fifty-four (54) opportunities to replay the amusement device at no additional cost, Investigator French attempted to obtain money from the person in charge of the FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677 in exchange for the accumulated replays. The person in charge informed Investigator French that the amusement device only provided replays, not money. At no time did the investigators from the Michigan Liquor Control Commission ever witness any cash rewards being made by any persons connected with, or acting in participation with, Appellant, FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677, with regards to this amusement device. CR, pp. 43-45, reprinted in the Appendix hereto, p. I-1.

On May 25, 1982, Investigator French returned to the premises of Appellant, FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677, in the company of Investigator Robert Basket. Investigator French again operated the amusement device and accumulated ten (10) replays. Investigator French confiscated the machine and charged Appellant, FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677, with a violation of 1980 AACS, R 436.1013, which prohibits the keeping of gambling devices on premises licensed by the Michigan Liquor Control Commission. Again, the investigators did not witness any cash payoffs being made to any persons within the premises of Appellant, FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677. CR, pp. 43-45, reprinted in the Appendix hereto, p. I-1.

An Administrative Hearing was held on the charge, and on December 1, 1982, Liquor Control Commissioner Andrew Metcalf issued an Opinion and Order, including findings of fact and conclusions of law. Commissioner Metcalf concluded that the device in question was a "gambling device" within the meaning of MCL 750.303(1); MSA 28.535(1) and 1980 AACS, R 436.1013(2), as the replays given by the machine were sufficient in and of themselves to constitute a reward.

Although the federal constitutional questions were raised in Appellant's Brief submitted to the Michigan Liquor Control Commission, they were not addressed in the Hearing Officer's Opinion.

On January 19, 1983, the Michigan Liquor Control Commission Appeal Board adopted the findings of fact and conclusions of law of Commissioner Metcalf, thereby affirming the Commissioner's decision. The federal questions were not addressed by the Commission despite being briefed by Appellant.

Following this adverse decision at the administrative level, Appellants filed a Complaint for Superintending Control with the Ingham County Circuit Court, seeking review of the decisions of the Michigan Liquor Control Commission. The Complaint specifically charged that MCL 750.303; MSA 28.535 violated the Due Process Clause and the Equal Protection Clause of the United States and Michigan Constitutions. See Complaint, paragraphs 19-21, reprinted in the Appendix hereto, p. H-5. The Ingham County Circuit Court did not rule on the constitutional claims. Rather, the Court rested its decision on state law grounds, holding that devices giving free replays were not gambling devices. Accordingly, the decisions of the Michigan Liquor Control Commission were reversed.

The Michigan Liquor Control Commission appealed the ruling of the Circuit Court to the Michigan Court of Appeals. The federal constitutional claims were briefed by both parties. On March 18, 1985, the Michigan Court of Appeals issued its decision affirming the decision of the Ingham County Circuit Court. The Court of Appeals declared that a portion of MCL 750.303(2); MSA 28.535(2) violated the Equal Protection Clause of the Constitution of the United States, and its Michigan counterpart. The Court could find no rational basis for distinguishing between the amount of replays on a machine, stating:

> "Why is 15 free games legal and 16 free games illegal?"
> *Id* at 466, 367 N.W.2d at 417.

This is precisely the issue before this Honorable Court.

The Michigan Court of Appeals also found that a portion of MCL 750.303(2); MSA 28.535(2) violated the due process requirements. The Court held that the statutory classifications were arbitrary and vague, and therefore unconstitutional.

On April 8, 1985, the Michigan Liquor Control Commission filed an application for leave to appeal with the Supreme Court of Michigan. The Supreme Court of Michigan granted leave to appeal on February 5, 1986.

The federal constitutional claims were briefed and argued by both parties before the Supreme Court of Michigan. On November 24, 1986, the Supreme Court of Michigan issued its decision reversing the decision of the Michigan Court of Appeals. The Supreme Court of Michigan held that MCL 750.303(2); MSA 28.535(2) did not violate the constitutional guarantees of due process of law and the equal protection of the laws, under either the Constitution of the United States or the Michigan Constitution.

THE QUESTIONS ARE SUBSTANTIAL

I

THE EXCLUSION AS GAMBLING DEVICES OF MECHANICAL GAMES GIVING FEWER THAN FIFTEEN (15) REPLAYS BEARS NO RELATION TO THE STATUTORY PURPOSE AND THUS VIOLATES EQUAL PROTECTION GUARANTEES.

The statutory classification involved in the case at bar bears no rational relationship to the asserted purpose of the statute. The Supreme Court of Michigan was extremely deferential in its evaluation of the statute without any examination of the factual basis for the classification. This deference is inconsistent with the pronouncements of this Honorable Court. As a result, a substantial question is posed by the case at bar, which warrants plenary review by this Court.

The Michigan legislature has enacted various measures within its penal code relating to gambling. MCL 750.301 et seq; MSA 28.533 et seq. Among these provisions is MCL 750.303(1); MSA 28.535(1), which imposes a penalty of imprisonment for not more than two years and/or a fine of not mc e than One Thousand and $^{0}/_{100}$ ($1,000.00) Dollars for any person found guilty of keeping or maintaining a game, partly of skill and partly of chance, which is used for "gaming". In addition, such games are subject to confiscation and destructio MCL 750.308(a); MSA 28.540(1).

MCL 750.303(2); MSA 28.535(2) creates an exemption from the strictures of MCL 750.303(1); MSA 28.535(1). This exemption is the subject of the instant appeal. The exemption in MCL 750.303(2); MSA 28.535(2) applies to any games which reward the player with fewer than fifteen (15) replays, contain no mechanisms for the discharge of accumulated replays, and contain no device used to record the number of free replays awarded. Accordingly, persons keeping or maintaining a device which awards sixteen replays are subject to criminal penalties, and confiscation of the devices, while persons keeping or maintaining the same device which awards fourteen replays are automatically exempted from such criminal penalties. This is true regardless of whether the device in question was ever used for gambling. In effect, the government has conferred a benefit (exemption from criminal prosecution) for persons keeping or maintaining amusement devices which reward a player with fewer than fifteen replays.

The classification created by the exemption in MCL 750.303(2); MSA 28.535(2) does not bear any rational relationship to any legitimate state purpose. Therefore, this classification violates the requirement of the Fourteenth Amendment to the Constitution of the United States that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

As the case at bar involves a challenge to a state statute of a social and economic nature, Appellants concede that the

statute must be evaluated under the "rational basis" test of the Equal Protection Clause. As stated by this Court:

> "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive scrutiny if the distinction rationally furthers a legitimate state purpose."
> *Hooper v. Bernalillo County Assessor*, 472 U.S. __, 105 S.Ct. 2862, 2866, 86 L.Ed.2d 487 (1985). See also *Zobel v. Williams*, 457 U.S. 55, 60, 102 S.Ct. 2309, 2312-2313, 72 L.Ed.2d 672 (1982).

Yet this "rational basis" standard "is not a toothless one." See *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 184, 101 S.Ct. 453, 464, 66 L.Ed.2d 368 (1981) (Brennan, J., dissenting). As this Court has stated:

> "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."
> *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. __, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985).

A statutory classification will be declared unconstitutional if the purpose behind the classification is not legitimate (see *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 791 (1985)), or, if the purpose is deemed legitimate, if the classification does not rationally further that purpose. Appellants concede that the purpose behind MCL 750.303; MSA 28.535, controlling gambling, is legitimate. Thus, the issue in the case at bar is whether the statutory classification rationally furthers that purpose.

Recent cases decided by this Honorable Court, and followed by lower federal courts, preclude the virtually nonexistent review by the Supreme Court of Michigan in the case at bar. These cases reflect a concern that the traditional "rational basis" scrutiny, which affords "minimum scrutiny in theory and virtually none in fact," is inadequate to protect persons

from being adversely affected by patently arbitrary classifications. Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Accordingly, a substantial question is presented regarding the precise parameters of equal protection "rational basis" analysis.

In *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), this Court struck down a congressional amendment to the Food Stamp Act which prohibited households containing unrelated persons from obtaining food stamps. As this Court stated:

> "The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the district court recognized, "[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements. 345 F.Supp., at 313."
> *Id* at 534, 93 S.Ct. at 2825.

This Court held in *Moreno* that the government's legitimate purpose in minimizing fraud could not be rationally served by the arbitrary distinction drawn in the statute. The distinction between related and unrelated households was based upon a set of "wholly unsubstantiated assumptions" concerning the relative stability of the households involved. *Id* at 535, 93 S.Ct. at 2826. This overbroad classification could not be utilized to exclude otherwise qualified households from receiving food stamps. As the challenged classification was "wholly without any rational basis," this Court held that the classification violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Id* at 538, 93 S.Ct. at 2827.

More recently, this Court has declared unconstitutional state statutory classifications which bear no rational relationship to any state purposes. In *Zobel v. Williams*, *supra*, this Court struck down the Alaska Dividend Program, which awarded the citizens of Alaska money based on the number of years of residency, on "rational basis" equal protection grounds. Two of the three asserted state purposes — creating a financial incentive for individuals to establish and maintain a residence in Alaska, and assuring prudent management of the state's natural resources — were legitimate. However, these purposes were not rationally furthered by the distribution scheme. The irrationality of this distribution scheme, in relation to the first justification, was described by Chief Justice Burger, speaking for the Court as follows:

> "In fact, newcomers seem more likely to become dissatisfied and to leave the state than well-established residents; it would thus seem that the state would give a larger, rather than a smaller, dividend to new residents if it wanted to discourage emigration. The separation of residents into classes hardly seems a likely way to persuade new Alaskans that the State welcomes them and wants them to stay."
> *Id* at 63, n. 9, 102 S.Ct. at 2314, n. 9.

The second justification — preserving the state's natural resources — was dismissed in a cursory manner.[2] *Id* at 63, 102 S.Ct. at 2314. Therefore, this classification violated the Equal Protection Clause of the Fourteenth Amendment.

Similarly, in *Hooper v. Bernalillo County Assessor*, *supra*, this Court declared a New Mexico statute unconstitutional, utilizing "rational basis" scrutiny. This statute granted a $2,000.00 property tax exemption for honorably discharged

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[2] The third justification — to reward citizens for past contributions — was rejected as not being a legitimate state purpose. As a result, there was no need for this Court to discuss whether the distribution scheme was rationally related to this third justification.

Vietnam veterans who resided in New Mexico prior to May 8, 1976. This Court held that the classification arbitrarily distinguished between those Vietnam veterans who resided in New Mexico prior to May 8, 1976, and those who chose to reside in New Mexico after May 8, 1976. The asserted purpose of the statute was to assist dislocated veterans who resided in New Mexico during or prior to the Vietnam War. Yet, as stated by Chief Justice Burger, again speaking for the Court:

> "Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a state bestows for national military service.
>
> * * *
>
> The statute is not written to require any connection between the veteran's prior residence and military service." *Id* at __, 105 S.Ct. at 2868.

Accordingly, the arbitrary classification between veterans residing before and after May 8, 1976, bore no rational relationship to the asserted state purpose, and thus violated the Equal Protection Clause of the Fourteenth Amendment.[3] See also *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985) (striking down Guam statute awarding retirement credits to current residents of Guam only if they were residents of Guam when they began their college studies).

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[3] Justice Steven's dissent noted some additional justifications for the eligibility date. These justifications concerned the State's budgetary resources and administrative convenience. *Id* at 2871. However, the majority did not address this aspect of the case, and it remains unresolved whether "administrative convenience" standing alone, is sufficient to constitute a "rational basis" under Equal Protection analysis, as the Michigan Supreme Court seemed to imply. See *Automatic Music and Vending Corporation v. Liquor Control Commission*, 426 Mich. 452, 459-460, 396 N.W.2d 204, 207 (1986), reprinted in the Appendix hereto at p. A-9.)

This Court also utilized "rational basis" analysis to strike down an arbitrary exemption from the imposition of a use tax. In *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985), Vermont had imposed a use tax on motor vehicles brought into the State from other states. Vermont residents who purchased motor vehicles out of state were eligible for an exemption from the use tax, based upon the taxes paid in the state of purchase. Non-residents who purchased cars out of state prior to relocating in Vermont were subject to the use tax, regardless of any taxes paid in the state of purchase. One asserted justification for the classification was that persons using Vermont highways should contribute to their upkeep. However, as explained by Justice White, speaking for the Court:

> "This 'basic policy' arguably supports the imposition of the use tax on appellants, and the denial of a credit to them; but it provides no rational reason to spare Vermont residents an equal burden."
> *Id* at 25-26, 105 S.Ct at 2473.

Arguably, Vermont residents purchasing motor vehicles from other states used Vermont highways to the same extent as non-residents who purchased vehicles elsewhere prior to moving to Vermont. As this classification — residence at the time of purchase — was "a wholly arbitrary basis on which to distinguish among present Vermont registrants," for purposes of imposing the use tax, this Court held that appellants had stated a claim of unconstitutional discrimination. *Id* at 23, 28, 105 S.Ct. at 2472, 2475.

Additionally, in *City of Cleburne, Texas v. Cleburne Living Center, supra*, this Court applied the "rational basis" analysis to strike down a zoning ordinance requiring a group home for the mentally retarded to apply for a special use permit. The ordinance also exempted any other care and multiple dwelling facilities from the special use permit requirement. The City advanced a number of legitimate purposes, but this Court

held that such purposes would not be rationally served by the classification.

First, the City claimed that the mentally retarded were different from other persons who might live in a similar care or multiple dwelling facility. This "difference" was insufficient to support this patently discriminatory ordinance. As stated by Justice White, again speaking for the Court:

> "But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses, such as boarding houses and hospitals, would not. *Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.*"
>
> *Id* at __, 105 S.Ct at 3259. (Emphasis added).

Accordingly, this Court required some evidence in the record below that these citizens actually posed a threat to the City's interest before the classification would pass the "rational basis" test.

Second, the City feared that the group home's proximity to a junior high school would subject the residents of the group home to harassment. The Court rejected these contentions as a product of "vague, undifferentiated fears," insufficient to constitute a "rational basis" for the discriminatory classification. *Id* at __, 105 S.Ct. at 3259.

Third, the home was located on a flood plain. However, this goal was still not rationally furthered by imposing the special use permit requirement on a select group of citizens, and not on other groups that might occupy the same premises.

Finally, the City was concerned with the size of the home and the number of persons occupying it. Yet, as stated by the Court:

> "It is true that they [the mentally retarded] suffer disability not shared by others; but why this difference

> warrants a density regulation that others need not observe is not at all apparent. *At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.*"
> *Id* at __, 105 S.Ct. at 3260. (Emphasis added).

As such, the special use permit requirement rested upon an irrational prejudice against the mentally retarded. As no rational basis existed for the distinction drawn by the ordinance, it violated the Equal Protection Clause of the Fourteenth Amendment.

During the October, 1985 Term, this Court decided two cases regarding the parameters of "rational basis" equal protection analysis. These cases reveal a continuation of the trend toward more careful examination of challenged classifications, particularly focusing on whether the record in the lower courts reveal a factual basis for the distinctions.

In *Attorney General of New York v. Soto-Lopez*, 476 U.S. __, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986), this Court struck down a New York civil service preference statute, which applied only to veterans who resided in New York at the time of entering the armed services, as violating the Equal Protection Clause of the Fourteenth Amendment. While four Justices applied a higher level of equal protection scrutiny, due to their position that a fundamental right was involved, Chief Justice Burger and Justice White, concurring in the judgment, concluded that this classification would not even pass "rational basis" scrutiny. *Id* at __, 106 S.Ct at 2328.

The correct application of the "rational basis" analysis was also discussed in *Lyng v. Castillo*, 477 U.S. __, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986). *Lyng* involved an equal protection challenge to a statutory classification for the receipt of food stamps. Parents, children and siblings living together were conclusively presumed to be a "household" entitled to receive

food stamps, while groups of more distant relatives, or persons unrelated to each other, had to demonstrate that they customarily purchased food and prepared meals together.[4] Although the majority held that this classification was rationally related to legitimate congressional purposes, Justices Brennan, White and Marshall dissented, declaring that this classification failed the "rational basis" test in that it bore no rational relationship to the prevention of fraud. Justice Marshall, joined by Justice White, stated:

> "In the present case, the government has provided no justification for the conclusion that related individuals living together are more likely to lie about their living arrangements than are unrelated individuals. Nor has it demonstrated that fraudulent conduct by related households is more difficult to detect than similar abuses by non-related households."
> *Id* at __, 106 S.Ct at 2734 (Marshall, J., dissenting).

Accordingly, Justices Brennan, Marshall and White would find that the classification violated the equal protection component of the Due Process Clause of the Fifth Amendment.

Lower federal courts have also utilized the "rational basis" Equal Protection analysis to strike down arbitrary and irrational classification. These classifications, like those involved in *Zobel*, *supra*, *Hooper*, *supra*, *Cleburne*, *supra*, and *Williams*, *supra*, and in the case at bar, bore no rational relationship to any legitimate state purpose. For example, in *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986), the Third Circuit Court of Appeals struck down a city charter provision requiring candidates for commissioner to be non-delinquent in

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[4] This classification thus differed from that involved in *Moreno*, *supra*. *Moreno* involved a classification which conclusively presumed that groups of unrelated persons were ineligible to receive food stamps, regardless of the individual characteristics of the group. In *Lyng*, groups of distant relatives, or unrelated persons, had an opportunity to rebut the presumption by showing that they customarily purchased food and prepared meals together.

paying their property taxes. The City claimed that the classification was necessary to insure that candidates for the commission were committed to the well-being of the City. The Court held that the classification did not further this legitimate purpose, noting:

> "The individual's decision to pay taxes does not logically reflect his commitment to the city, because his decision may rest solely on economic, ideological, or other personal grounds."
> *Id* at 335.

Moreover, the City claimed that the classification furthered public respect for elected officials. Again, the court held that the classification did not rationally further this purpose, as the electorate was actually prevented from electing the person of their choice. As stated by the Court:

> "Can there be respect for a system that summarily denies the privilege of elected office to those who, for reasons totally unrelated to their commitment to the community, do not pay taxes?"
> *Id* at 336.

Accordingly, this classification bore no rational relationship to any legitimate purpose, and thus violated the Equal Protection Clause of the Fourteen Amendment.

Similarly, in *Christian Science Reading Room v. City & County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), *cert. denied* 55 U.S.L.W. 3508 (U.S. Jan. 27, 1987) (No. 85-918), the Ninth Circuit Court of Appeals applied the "rational basis" scrutiny to strike down a classification which distinguished between religious organizations and all other organizations relating to leasing portions of the San Francisco International Airport. The classification was adopted to prevent any possible First Amendment violations. After finding that no First Amendment violation would occur as a result of continuing the lease

on the Christian Science Reading Room, the Court concluded that the classification, which prohibited only religious organizations from leasing any portion of the airport, did not futher any legitimate state purpose. The classification was arbitrary and irrational, and therefore violated the Equal Protection Clause of the Fourteenth Amendment.

Additionally, in *Oklahoma Broadcasters Association v. Crisp*, 636 F. Supp. 978 (W.D. Okla. 1985), an Oklahoma constitutional provision, and its accompanying statute, prohibited all in-state advertising of alcohol except in limited circumstances. However, advertising originating outside the State of Oklahoma, but broadcast or sent into Oklahoma, was permitted. Thus, the provisions established an arbitrary classification between advertising originating inside the State of Oklahoma, and advertising originating outside the State of Oklahoma. In striking down this classification on "rational basis" equal protection grounds, the Federal District Court noted:

> "The asserted state interest of the State of Oklahoma in enforcing its alcoholic beverage advertising prohibition is to prevent the artificial stimulation of demand resulting in increased overall consumption of alcoholic beverages and alcohol-related abuses. *However, there is no credible evidence in the record before this court that the State's ban on alcoholic beverage advertising, as applied, serves even remotely to accomplish the asserted goal.* Based upon Oklahoma's stipulations, Oklahoma's prohibition on alcoholic beverage advertising has little or no effect on demand for alcoholic beverages, has little or no effect on overall consumption of alcoholic beverages, and has little or no effect on reducing alcohol abuse.
>
> Utilizing even the lowest possible standard of review, the Court finds that Oklahoma applies its prohibition on alcoholic beverage advertising in an arbitrary, capricious, and irrational manner."
>
> *Id* at 992. (Emphasis added).

The fact that the State had a concededly legitimate purpose, in curbing alcohol abuse pursuant to its police powers, was irrelevant. The means used were simply too attenuated to rationally further that purpose. Accordingly, the classification violated the Equal Protection Clause of the Fourteenth Amendment. See also *Faheem-El v. Klincar*, 620 F. Supp. 1308 (N.D. Ill. 1985) (equal protection challenge to distinction between re-arrested parolees and probationers regarding bail held likely to be successful on the merits for purposes of issuing a preliminary injunction).

Cleburne, *supra*, *Hooper*, *supra*, and the other cases discussed above indicate that the "rational basis" standard for evaluating allegedly arbitrary classifications has been refined. No longer is the "rational basis" test outcome determinative. A mere hypothesized connection between a legitimate state purpose, and the means used to attain that purpose, is not sufficient to withstand "rational basis" scrutiny. See *Cleburne*, *supra* at __, 105 S.Ct. at 3259-3260. Under this refined rational basis standard, courts are now examining the record to determine whether any evidence exists in support of the classification. *Cleburne*, *supra* at __, 105 S.Ct, at 3259, 3260; see also *Moreno*, *supra* at 535, 93 S.Ct at 2826 ("wholly unsubstantiated assumptions" are insufficient to constitute a rational basis for an otherwise arbitrary classification); *Oklahoma Broadcasters*, *supra* at 922 (no credible evidence *on the record* that classification rationally furthered the legitimate state interest in curbing alcohol abuse).

Thus, the rational basis test appears to have been transformed into a standard of review capable of protecting citizens against the arbitrary and irrational decisions of legislatures where no factual basis appears in the record for the classification. As stated by one federal district court:

> "The Supreme Court is now applying the rational basis test more stringently than in the past. Under the *Cleburne* formulation of the rational basis test, *there is no place for*

> *judicial imagination or hypothesizing about possible legislative purposes*. . . Further, a court's genuine inquiry may test the rationality of the classification."
> *Coburn by and through Coburn v. Agustin*, 627 F. Supp. 983, 990 (D. Kan. 1985). (Emphasis added).

The analysis by the Supreme Court of Michigan does not comport with the requirements set forth in the cases cited above. See *Cleburne*, *supra*, *Williams*, *supra*, *Hooper*, *supra* and *Zobel*, *supra*.

In the case at bar, the Michigan Court of Appeals properly applied the "rational basis" test and struck down the arbitrary classification embodied in MCL 750.303(2); MSA 28.535(2). The Court of Appeals could find no rational basis for rendering games which awarded sixteen replays illegal, while exempting similar devices which awarded fifteen replays. There was no evidence in the record that amusement devices in question were ever used for gambling. Moreover, there was no evidence in the record that video machines, which awarded more than fifteen replays, were more likely to be used as gambling devices, or that these machines tended to induce people to gamble.

The likelihood that there would be gambling based on the number of replays rewarded is the foundation of this statute. However, this conclusion is based on "wholly unsubstantiated assumptions" and is devoid of logic. *Moreno*, *supra*. It is just as likely that one would gamble on a game of bowling where the player is given a free frame for successful play as on a "Pac-Man" game that can be played continuously by the skilled participant.

In reversing the decision of the Michigan Court of Appeals, the Supreme Court of Michigan conceived the following rationale for the classification embodied in MCL 750.303(2); MSA 28.535(2):

> "The Legislature may reasonably believe that the larger the number of free replays available, the greater the incentive to make cash payoffs. As the existence of such

> payoffs may be difficult to prove, the Legislature strove to avoid the problem simply by allowing only a small number of replays to accumulate on these machines. The fact that the Legislature picked a particular number as the dividing line is a matter purely within its discretion." *Id* at 459-460, 396 N.W.2d at 207.

There was no analysis whatsoever by the Michigan Supreme Court regarding the legislative "dividing line." The court did not undertake any effort to review the likelihood that gambling was more apt to occur on a machine that awarded sixteen replays as opposed to fourteen replays. There was no testimony on this issue in the administrative proceedings or at any judicial level. The entire record in this case is devoid of any attempt by the State to demonstrate the greater likelihood of persons to gamble on a device giving more replays. Under any interpretation of the "rational basis" test there must be some *evidence in the record* to support the linkage between the act's purpose and the classification. *Cleburne*, *supra*; *Oklahoma Broadcasters*, *supra*. Thus, the classification drawn by MCL 750.303(2); MSA 28.535(2), and upheld by the Supreme Court of Michigan, is based upon pure speculation, and is unsupported by any evidence or common sense.

II.

MCL 750.303(1); MSA 28.535(1) IS SO VAGUE THAT IT VIOLATES THE DUE PROCESS GUARANTEE OF THE UNITED STATES CONSTITUTION.

MCL 750.303(1); MSA 28.535(1) is so vague that it violates the due process guarantee of the United States Constitution. This provision of the statute defines an illegal game as one of "skill or chance or game partly of skill and partly of chance, used for gaming." These terms are so broad as to render them meaningless. If these terms were to be construed literally, numerous video games and forms of amusement would be encompassed by the language of MCL 750.303(1); MSA 28.535(1). In fact, this phrase encompasses countless

games permitted by the State, and consequently gives no advance warning as to what degree of chance is permitted or what constitutes "used for gaming." There is no indication in this penal statute that a free replay is equated with use for gaming. Thus, the statute fails to satisfy the due process guarantee of the United States Constitution.

It is well established that statutes giving insufficient warning of prohibited action are void for vagueness. This Honorable Court has continuously invalidated state statutes which do not adequately inform ordinary citizens of exactly what conduct is prohibited. Recently, in *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), this Court invalidated a California penal statute which required persons suspected of loitering to provide "credible and reliable" identification upon request by a police officer. The statute contained no standards to guide ordinary citizens as to what constituted "credible and reliable" identification. Law enforcement officials thus had unfettered discretion to decide for themselves what constituted "credible and reliable" identification. Accordingly, this statute was held void for vagueness, as it was contrary to the dictates of due process. See also *Hynes v. Mayor and Council of the Borough of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

Michigan courts have strictly applied this constitutional mandate. In *People v. Austin*, 301 Mich. 456, 3 N.W.2d 841 (1942), the Michigan Supreme Court voided a statute which provided a penalty for discrimination in the sale of petroleum products between different "sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community or city than is charged. . . in another section, community or city. . ." The Court in *Austin* held that the

terms "section" and "community" were too vague to adequately warn citizens of proscribed conduct and stated as follows:

> "...these terms [are] so uncertain and incapable of accurate definition that one could not know with any degree of certainty whether he was commiting the offense against which the statute is aimed."
> *Id* at 463, 3 N.W.2d at 843.

The Court in *Austin* went on to cite with approval the following language from *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1925):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."
> *Id* at 463, 3 N.W.2d at 844. (Citations omited).

The statute in the case at bar offers no advance warning of the type of game prohibited. Certainly the phrases "game of skill or chance" or "games partly of skill and partly of chance" are so blatantly ambiguous and vague that they lack any real meaning. The Michigan Supreme Court held that a free replay renders a device "used for gaming." However, no ordinary citizen could possibly be on notice that a free replay on a video game could cause the device to be illegal and subject him to criminal penalties.

Other Michigan courts have continued to enforce this long standing rule of law that vague statutes will not be tolerated. In *City of Detroit v. Sanchez*, 18 Mich. App. 399, 171 N.W.2d 452 (1969), the Court held that a City ordinance which makes it unlawful to "wrongfully follow" any person in a public

street is, because of its vagueness, repugnant to the Due Process Clause of the Constitution. In refusing to sustain a conviction under this statute, the Court stated:

> "The vagueness which invalidates this ordinance is its over-breadth of coverage rather than in precise terminology or phraseology. The conviction cannot be sustained, because the ordinance makes criminal innocent as well as culpable conduct." *City of Detroit v. Bowden*, 6 Mich. App. 514; 149 N.W.2d 771 (1967).
>
> * * *
>
> "We will not permit the City to shift the burden of proof to the defendant in such an unconstitutional way."
> *Id* at 401-402, 404, 171 N.W.2d at 453. (Citations omitted).

The *Sanchez* case is analogous to the case at bar in that both statutes are so broad that they prohibit both culpable and permissible conduct. Certainly, there are a plethora of permissible games which fall within the language of MCL 750.303(1); MSA 28.535(1).

The statute involved in the case at bar is so broad and indefinite that its scope is determined by the whim of the law enforcement officers. This also renders the statute violative of the Due Process Clause of the United States and Michigan Constitutions. This issue was discussed in *People v. Olsonite*, 80 Mich. App. 763; 265 N.W.2d 176 (1978), *lv den* 402 Mich. 845 (1978), where the Court invalidated a Wayne County air pollution control regulation on vagueness grounds, citing with approval the following language from *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972):

> "A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."
> *Id* at 771, 265 N.W.2d at 179.

The Court in *Olsonite* went on to state:

> "Police, judges and juries are given nothing but their own subjective judgment as to what constitutes an odor or other omission which is 'detrimental to any person' or 'endangers the comfort of any person or the public'." *Id* at 771, 265 N.W.2d at 179.

In the instant cause, there are countless games of "skill or chance" or "partly of skill and partly of chance" which give free replays. It is a blatant constitutional violation to allow the State to arbitrarily determine which games they would like to call gambling devices.

In a context directly analogous to the case at bar, the Michigan Court of Appeals struck down a local ordinance based on the similarity between prohibited and non-prohibited amusement devices. In *People v. Palazzolo*, 62 Mich. App. 140, 233 N.W.2d 216 (1975), the court voided a local ordinance prohibiting pinball machines, but exempting bowling, on due process grounds. The ordinance, drafted in 1941, used language similar to MCL 750.303(1); MSA 28.535(1), in that it prohibited games "of skill or chance, or partly of skill and partly of chance, used or capable of being used for gaming." Yet the Michigan Court of Appeals struck down the ordinance on due process grounds, as the statute's antiquated language was so vague that it did not inform the modern-day amusement device operator exactly what games were prohibited. The Michigan Court of Appeals noted:

> "Further, modern pinball machines are not gaming devices within the meaning of the general language of the ordinance. The addition of flippers to pinball machines, which has occurred since the passage of the ordinance in question and since the decision in the *Oatman* case, has so enhanced the skill aspect of the game that an ordinance drafter who prohibited gambling devices in 1941 would not have intended to prohibit modern pinball machines.

* * *

> In light of the changes which have taken place in the last 30 years in the field of coin-operated amusement machines, we must conclude that the ordinance is vague and ambiguous because it does not inform the citizen with reasonable precision what acts it intends to prohibit.
> *Id* at 144–145, 233 N.W.2d at 219.

See also *Papachristou*, *supra* (vagrancy ordinance using "archaic" language struck down on due process ground, as ordinary citizens would have no understanding of what the ordinance actually prohibited). The City ordinance in *Palazzolo* is similar to MCL 750.303(1); MSA 28.535(1) in that both laws have the goal of preventing undesirable games or devices. However laudable this aim, the Court in *Palazzolo* still required that constitutional mandates be followed and struck down the ordinance as violative of the Constitution. Although *Palazzolo* involves virtually identical issues and facts present in the instant cause, it was not even addressed by the Michigan Supreme Court.

The principles stated above, prohibiting vague statutes, have been embedded in constitutional law since early times. In *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903), the Court quoted Chief Justice Waite in *United States v. Reese*, 92 U.S. 214, 221 (1876):

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the judicial for the legislative department of the government."
> *Id* at 141, 23 S.Ct. at 680.

The statute involved in the case at bar certainly sets the largest of nets. In examining MCL 750.303(1); MSA 28.535(1), "no ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *U.S. v. Capitol Traction Company*, 34 App. D.C. 592 (1910). MCL 750.303(1); MSA

28.535(1), which apparently allows such games as backgammon, gin rummy, bridge, monopoly, scrabble and various video and amusement games giving free replays, all of which are games of "skill and chance" or "partly of skill or partly of chance", does not meet the constitutional standards of adequately warning citizens that a video poker game, which gives only free replays as a reward, is prohibited.

CONCLUSION

The exemption contained in MCL 750.303(2); MSA 28.535(2) bears no relationship to the statutory purpose of prohibiting gambling. The definition of a gambling device under MCL 750.303(1); MSA 28.535(1) includes any machine giving free replays. No ordinary citizen could possibly be on notice that a device giving free replays subjects him to criminal penalties. Both of these statutory provisions violate constitutional guarantees.

Based on the foregoing, Appellants, AUTOMATIC MUSIC AND VENDING CORPORATION and FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677, respectfully request this Honorable Court to note probable jurisdiction of this appeal.

Respectfully submitted:

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Dated: February 18, 1987

APPENDIX TO
JURISDICTIONAL STATEMENT

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AUTOMATIC MUSIC AND VENDING CORPORATION v LIQUOR CONTROL COMMISSION

Docket No. 76285. Argued October 9, 1986 (Calendar No. 15). Decided November 24, 1986.

Officers of the Liquor Control Commission confiscated a draw poker machine as a gambling device from and brought a complaint before the Liquor Control Commission against the Fraternal Order of Eagles, Sanford Aerie, No. 3677. The commission found the machine to be an illegal gambling device under MCL 750.303; MSA 28.535, and the Liquor Control Commission Appeal Board affirmed. Automatic Music and Vending Corporation, the owner of the machine, and the Sanford Eagles Club, brought an action in the Ingham Circuit Court seeking superintending control. The court, Robert Holmes Bell, J., reversed, findnig that free replays do not constitute a reward and are not gaming as statutorily defined. The Court of Appeals, CYNAR and GILLESPIE, JJ. (D.E. HOLLBROOK, JR., P.J., concurring), affirmed, holding that the draw poker machine was not a gaming device and that MCL 750.303(2); MSA 28.535(2) was unconstitutional (Docket No. 71889). The commission appeals.

In a unanimous opinion by Chief Justice WILLIAMS, the Supreme Court *held*:

The draw poker machine at issue in this case is an illegal gaming device under MCL 750.303(1); MSA 28.535(1) and does not qualify for an exemption under MCL 750.303(2); MSA 28.535(2). The statutory exemption is constitutional.

REFERENCES

Am Jur 2d, Gambling §§ 10 *et seq.*

Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by antigambling laws. 89 ALR2d 815.

1. Gaming (or gambling) requires the presence of three elements: price or consideration, chance, and prize or reward. A machine which encompasses these elements is a machine used for gaming under MCL 750.303(1); MSA 28.535(1). The draw poker machine at issue in this case is a gambling device as defined by the statute. It requires money to play, employs chance in the random distribution of cards, and provides a reward in the form of free replays. The machine does not qualify as an exempt amusement device because it allows the accumulation of more than fifteen replays, allows free replays to be discharged without actually being played, and keeps a record of the number of free replays awarded, contrary to the provisions of MCL 750.303(2); MSA 28.535(2).

2. The exemption provided under the statute for certain devices does not deny equal protection. The requirements for exemption are reasonably related to a legislative goal. A classification having some reasonable basis does not offend the Equal Protection Clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. Nor is the statute unconstitutionally vague. The meanings of the enumerated exemption requirements are obvious and comprehensible.

Reversed.

141 Mich App 458; 367 NW2d 413 (1985) reversed.

1. Licenses — Gaming Devices — Draw Poker Machines.

A draw poker machine which required insertion of money to play, employed chance in the random distribution of playing cards, and provided a reward in the form of free replays, and which did not qualify as an exempt amusement device because it allowed the accumulation of more than fifteen replays, allowed free replays to be discharged without actually being played, and kept a permanent record of the number of

free replays awarded was an illegal gaming device (MCL 750.303[1], [2]; MSA 28.535[1], [2]).

2. Constitutional Law — Equal Protection — Vagueness — Gaming Devices — Amusement Devices.

The provision of the Penal Code which exempts from the statutory proscription of gaming devices mechanical amusement devices which, through application of an element of skill, reward a player with free replays of the device, and which do not allow more than fifteen replays or the discharge of free replays without actually being played or keep a permanent record of the replays awarded is not unconstitutionally vague (US Const. Am XIV; Const 1963, art 1, § 17; MCL 750.303[1], [2]; MSA 28.535[1], [2]).

Cooper & Fink (by *Daniel S. Cooper, P.C. Mark J. Zausmer,* and *David H. Fink, P.C.*) for the plaintiffs.

Frank J. Kelley, Attorney General, *Louis J. Caruso*, Solicitor General, and *Frank J. Pipp, Larry F. Brya, Kevin Thom,* and *James L. Stropkai*, Assistant Attorneys General, for the defendant.

Williams, C.J. The issue in this case is whether a draw poker machine is an illegal gaming device under MCL 750.303; MSA 28.535. We hold that the machine in question is an illegal device under that statute. We also reject plaintiff's challenges to the constitutionality of the statute.

Facts

The facts are accurately and concisely summarized in the opinion of the Court of Appeals, 141 Mich App 458, 461-462; 367 NW2d 413 (1985):

> Early in 1982, officers of the Michigan Liquor Control Commission became aware that the Sanford Eagles Club

had a "draw poker" video machine in the club. This machine has five windows. When twenty-five cents is inserted in the machine, a playing card appears in each window. Below each window is a button. If a player is dissatisfied with the card first appearing in a window, he may press the button under that card and the first card will disappear and be replaced by another card.

The machine has two counters on the inside, one which keeps track of the number of quarters placed into the machine and the other which keeps track of the number of free replays erased off the machine without playing them. The device also has a key mechanism which can erase free replays without the replays being played.

Once a satisfactory hand is established, the game is played as five-card draw poker. When certain hands are obtained, credits are given which entitle the player to free plays.

On March 30, 1982, the local inspector for the MLCC, Robert Basket, and his supervisor, Donald French, went to the Sanford Eagles Club and played the machine. Supervisor French won 54 free games on that date.

The officers asked the bartender, Lydia Oswald, if the games could be traded for cash. She informed them that the Eagles did not pay off in cash but only in free replays.

On May 25, 1982, the same Liquor Control Commission officers returned to the club and played the machine. After this the officers confiscated the machine as a gambling device and issued a complaint with the Michigan Liquor Control Commission against the Sanford Eagles Club. A hearing was held before Hearing Commissioner Andrew Metcalf, Jr., who rendered an opinion on

December 1, 1982, finding the machine to be a game "partly of skill and partly of chance" and an unlawful gambling device under MCL 750.303(1) and 1980 AACS R 436.1013(2). Commissioner Metcalf also ruled that Automatic Music and Vending Corporation could not intervene in the hearing as it was not an involved party. The commissioner ordered a fine of $250 and costs. He did not confiscate the machine.

Commissioner Metcalf's decision was upheld by the commission on appeal in January, 1983.

Automatic Music then applied to the circuit court for Ingham County for an order of superintending control to review the actions of the commission. Judge Robert Holmes Bell, in a terse order, reversed the commission and found that free replays do not constitute a reward and are not gaming as defined by MCL 750.303; MSA 28.535.

The Court of Appeals affirmed the order of the circuit court and held: (1) that the draw poker machine was not a gaming device, and (2) that MCL 750.303(2); MSA 28.535(2) was unconstitutional. This Court granted leave to appeal 424 Mich 877 (1986).

I.

STATUTORY PROVISIONS

The plaintiff, the Fraternal Order of Eagles, holds a club license issued by the Michigan Liquor Control Commission. As the holder of a club license, plaintiff is subject to regulation 1980 AACS, R 436.1013 which provides in part:

> A licensee shall not allow any gambling devices on the licensed premises which are prohibited by the statutes of this state.

MCL 750.303; MSA 28.535, the statute which discusses gambling devices provides in relevant part:

> (1) A person who for hire, gain, or reward, keeps or maintains a gaming room, gaming table, game of skill or chance, or game partly of skill and partly of chance, used for gaming, or who permits a gaming room, or gaming table, or game to be kept, maintained, or played on premises occupied or controlled by the person, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or a fine of not more than $1,000.00. . . .
>
> (2) This section shall not apply to a mechanical amusement device which may through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost if the mechanical amusement device is not allowed to accumulate more than 15 replays at 1 time; the device is designed so that accumulated free replays may only be discharged by reactivating the device for 1 additional play for each accumulated free replay; and the device makes no permanent record directly or indirectly of the free replays awarded.

A. Analysis of MCL 750.303(1); MSA 28.535(1)

Since MCL 750.303(1); MSA 28.535(1) does not define the term "gaming,"[1] we refer to the common-law definition which requires the presence of three elements; (1) price or consideration, (2) chance, and (3) prize or reward. 89 ALR2d 815, 827. See also *State v Pinball Machines*, 404 P2d 923, 925 (Alas, 1965); *Farina v Kelly*, 147 Conn 444, 449-450; 162 A2d 517 (1960; *State v Paul*, 43 NJ Super 396, 402-404; 128 A2d

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[1] In accordance with the generally accepted view that the terms "gaming" and "gambling" are synonymous, they are used interchangeably. See, e.g., Black's Law Dictionary (5th ed), which defines "gaming" as "the practice or art of gambling."

737 (1957); *Westerhaus Co v Cincinnati*, 165 Ohio St 327, 335-336; 135 NE2d 318 (1956). Therefore, a machine which encompasses these three elements is a machine "used for gaming" under MCL 750.303(1); MSA 28.535(1).

With respect to the draw poker machine which is the subject of this dispute, both parties agree that consideration, in the form of the money needed to play the game, and chance, in the random distribution of the cards, are present. The more controversial issue is whether or not a free game constitutes a reward or prize. This issue has previously been considered and decided by this Court.

In *Oatman v Port Huron Chief of Police*, 310 Mich 57, 59; 16 NW2d 665 (1944), we held that "[s]ince these free plays, the testimony shows, would ordinarily cost the player five cents each, the opportunity to have free plays is a thing of value." See also *Henry v Kuney* 280 Mich 188, 192; 273 NW 442 (1937).

> "[W]here there is an element of chance in the operation of the slot machine — where the one who plays the machine stands to win or lose money, *trade checks*, or prizes, by a chance, — the machine is a gambling device. . . ." [Emphasis added.]

We see no reason to reverse this decision as we are not persuaded that changes in the amusement machine industry have rendered the statute meaningless.[2] Therefore, the draw poker machine is a gambling device under MCL 750.303(1); MSA 28.535(1).

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[2] Numerous cases decided since the *Oatman* decision have reached the conclusion that a free replay is a thing of value. See, e.g., *State v Pinball Machines, supra* at 926; *State v Lake Geneva Lanes*, 22 Wis 2d 151, 153-154; 125 NW2d 622 (1963); *Worl v State of Indiana*, 243 Ind 116, 122; 183 NE2d 594 (1962); *Farina, supra* at 449-450; *State v Paul, supra* at 402-404; *State v Sandfer*, 93 Okla Crim 228, 234-235; 226 P2d 438 (1951); *State v Doe*, 242 Iowa 458, 463-464; 46 NW2d 541 (1951). See also *Commonwealth v Two Electronic Poker Game Machines*, 502 Pa 186, 195-196; 465 A2d 973 (1983) (holding a free game in the presence of other factors such as a "knock off" button and a meter to record unplayed free games was a thing of value.)

B. Relevance of the Statutory Exception

In 1975, the Legislature amended MCL 750.303; MSA 28.535 and added subsection 2. That section provides for the exemption of certain devices from subsection 1. The exemption states that it

> *shall* not apply to a mechanical amusement device which may through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost if the mechanical amusement device is not allowed to accumulate more than 15 replays at 1 time; the device is designed so that accumulated free replays may only be discharged by reactivating the device for 1 additional play for each accumulated free replay; and the device makes no permanent record directly or indirectly of the free replays awarded.

The draw poker game at issue does not qualify for this exemption because: (1) it allows the accumulation of more than fifteen replays; (2) there is a button on the machine which can discharge all the free replays, and (3) there is a permanent record kept in the machine of the number of free replays awarded.

II.
Constitutionality of the Statutory Exception

The Court of Appeals held that MCL 750.303(2); MSA 28.535(2) unconstitutionally denies equal protection and is unconstitutionally vague. We disagree with both findings.

A. Equal Protection Challenge

The Court of Appeals correctly stated that the appropriate test for an equal protection claim under both the Michigan and the United States Constitutions is whether the legislation

bears a reasonable relationship to a legitimate goal of the Legislature. As we stated in *Johnson* v *Harnischfeger Corp*, 414 Mich 102, 114; 323 NW2d 912 (1982), in challenging a statute on equal protection grounds, a plaintiff must show that the classifications created "are so arbitrary that they cannot be supported under any state of facts, either known or which could reasonably be assumed." See also *Shavers* v *Attorney General*, 402 Mich 554, 613; 267 NW2d 72 (1978); *Mutchall* v *Kalamazoo*, 323 Mich 215, 227; 35 NW2d 245 (1948).

It appears that the Court of Appeals in this case found that the distinction made in the statute between machines which allow fifteen or fewer free replays and those which allow more was unconstitutionally arbitrary. We cannot agree. The Legislature may reasonably believe that the larger the number of free replays available, the greater the incentive to make cash payoffs. As the existence of such payoffs may be difficult to prove, the Legislature strove to avoid the problem simply by allowing only a small number of replays to accumulate on these machines. The fact that the Legislature picked a particular number as the dividing line is a matter purely within its discretion.

As we have noted in the past, "A classification having some reasonable basis does not offend [the Equal Protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Naudzius* v *Lahr*, 253 Mich 216, 222-223; 234 NW 581 (1931).

B. Vagueness Claim

In its review of MCL 750.303(2); MSA 28.535(2), the Court of Appeals also found that the language used was vague. The Court stated:

> We are unable to fathom what the Legislature meant by 15 games. What is meant by one replay? What is the purpose of prohibiting a "knock off" button or making recordation of free games illegal. [141 Mich App at 466.]

We find these objections unpersuasive. Obviously, one replay is a single game awarded by the machine. A "knock off" button is a button which allows free replays to be discharged without actually being played thus violating that section of the statute which requires free replays to be discharged only by reactivating the machine for one additional play. The statutory requirement that exempt machines keep no permanent record of the free replays is likewise perfectly comprehensible.[3] We do not find the langugage of the statute unconstitutionally vague.

Conclusion

We hold that the draw poker machine at issue is an illegal gaming device under MCL 750.303(1); MSA 28.535(1) and that it does not qualify for an exception under MCL 750.303(2); MSA 28.535(2). We hold the statutory exception constitutional. The decision of the Court of Appeals is reversed.

Levin, Brickley, Cavanaugh, Boyle, Riley, and Archer, JJ., concurred with Williams, C.J.

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[3] In prohibiting "knock off" buttons and the recording of free replays, the Legislature was attempting to make it more difficult for the owners of machines to make cash payoffs. See, e.g., *United States* v *One Bally "Barrel-o-Fun"*, 224 F Supp 794, 797–798 (MD Pa, 1963):

> "The knock-off button for releasing free plays and the meter for recording the free plays released. . . serve no useful purpose on a machine designed merely for amusement and they increase the cost of the machine without increasing the income from the machine when used for amusement." [Quoting *Turner* v *United States*, 9 AFTR2d 2031 (1962).]

Peachey v *Boswell*, 240 Ind 604, 614; 167 NE2d 48 (1960) ("It seems apparent that it would be much more improbable that *unrecorded* free games might be exchanged for money or other things of value. . . .") (Emphasis in the original; citing *Tinder* v *Music Operating, Inc*, 237 Ind 33, 55; 142 NE2d 610 (1957); *Eads* v *J & J Sales Corp*, 257 Ind 485, 487; 275 NE2d 802 (1971), suggesting that a device which records replays awarded may be used to compute payoffs.

AUTOMATIC MUSIC AND VENDING CORPORATION v LIQUOR CONTROL COMMISSION

Docket No. 71889. Submitted April 18, 1984, at Lansing. — Decided March 18, 1985. Leave to appeal applied for.

Officers of the Michigan Liquor Control Commission confiscated a "draw poker" video machine as a gambling device and issued a complaint with the commission against the Fraternal Order of Eagles, Aerie No. 3677, in Sanford, Michigan. The Eagles hold a club license issued by the commission. A hearing was held before a hearing commissioner who rendered an opinion finding the machine to be a game partly of skill and partly of chance and an unlawful gambling device. The hearing commissioner also ruled that Automatic Music and Vending Corporation, the owner of the machine, could not intervene in the hearing as it was not an involved party. The commissioner ordered a fine of $250 and costs. The commissioner's decision was upheld by the commission on appeal. Automatic Music then petitioned in the Ingham Circuit Court for an order of superintending control to review the actions of the commission. The circuit court, Robert Holmes Bell, J., ordered that the court take superintending control of the matter and reversed the commission. Judge Bell found that the free replays given by the machine do not constitute a reward and are not gaming and, therefore, not illegal. The Michigan Liquor Control Commission appeals.

Held:

1. It was proper for the circuit court to allow Automatic Music to intervene and petition the court for an order of superintending control.

References for Points in Headnotes

[1, 2] 2 Am Jur 2d, Administrative Law § 735.

[3] 2 Am Jur 2d, Administrative Law §§ 76, 735, 743.

[4] 38 Am Jur 2d, Gambling § 17.

2. The "draw poker" video game involved in this action is not a gaming device. The Legislature, in enacting MCL 750.303(2), a Penal Code provision concerning gambling, intended to legalize machines which are games having an element of skill and where the "reward" is limited to free games and does not include pecuniary or merchandise rewards.

3. MCL 750.303(2) is applicable to this case insofar as it legalizes mechanical amusement devices which through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost. The balance of that subsection is arbitrary and vague and, therefore, unconstitutional.

Affirmed.

CYNAR, J., concurred and wrote separately to note that he found the majority's reasoning compelling for constitutional as well as practical reasons.

1. SUPERINTENDING CONTROL — APPEAL — COURT RULES.

An order of superintending control does not supersede the use of normal appellate procedures (GCR 1963, 711).

2. SUPERINTENDING CONTROL — APPEAL.

Superintending control is a proper remedy when general policies of an inferior tribunal are being reviewed.

3. ADMINISTRATIVE LAW — SUPERINTENDING CONTROL — PARTIES — INTERVENTION — COURT RULES.

A petitioner should be allowed to intervene in an action in which it was not a party and petition the circuit court for an order of superintending control where the petitioner is aggrieved by the action of an administrative agency which it seeks to have reviewed (GCR 1963, 711.2)

4. LICENSES — GAMING — PRIZES — CONSTITUTIONAL LAW.

The Legislature, by the passage of the Penal Code subsection concerning exceptions to the prohibition of gaming rooms

or apparatus, intended to legalize machines which are games having an element of skill where the reward is limited to free games and does not include pecuniary or merchandise rewards; the subsection is constitutional insofar as it legalizes mechanical amusement devices which through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost, but the balance of the subsection is arbitrary and vague and, therefore, unconstitutional (MCL 750.303[2]; MSA 28.535[2]).

Daniel S. Cooper, P.C. (by *Daniel S. Cooper*), for appellees.

Frank J. Kelley, Attorney General, *Louis J. Caruso*, Solicitor General, and *Frank J. Pipp* and *Larry F. Brya*, Assistants Attorney General, for appellant.

Before: D. E. HOLBROOK, JR., P.J., and CYNAR and T. GILLESPIE,* JJ.

T. GILLESPIE, J. This appeal is from an order of superintending control in which the Circuit Court for Ingham County reversed an administrative order of the Michigan Liquor Control Commission which had found Aerie No. 3677, Fraternal Order of Eagles, in Sanford, Michigan, in violation of MCL 750.303; MSA 28.535 and 1980 AACS R 436.1013 concerning gaming.

The order of the circuit court is affirmed.

The Fraternal Order of Eagles, Aerie No. 3677, in Sanford, Michigan, is the holder of a club license issued by the Michigan Liquor Control Commission. This license was issued pursuant to MCL 436.24(c); MSA 18.995(c).

As a permit holder, it is subject to regulation under 1980 AACS R 436.1013, which provides:

"(1) A licensee shall not allow unlawful gambling on the licensed premises.

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* Circuit judge, sitting on the Court of Appeals by assignment.

"(2) A licensee shall not allow any gambling devices on the licensed premises which are prohibited by the statutes of this state."

The permit holder would also be bound under the applicable gaming statute which is MCL 750.303; MSA 28.535 and reads in part:

"(1) A person who for hire, gain, or reward, keeps or maintains a gaming room, gaming table, game of skill or chance, or game partly of skill and partly of chance, used for gaming, or who permits a gaming room, or gaming table, or game to be kept, maintained, or played on premises occupied or controlled by the person, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or a fine of not more than $1,000.00. A person who aids, assists, or abets in the keeping or maintaining of a gaming room, gaming table, or game, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or a fine of not more than $1,000.00.

"(2) This section shall not apply to a mechanical amusement device which may through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost if the mechanical amusement device is not allowed to accumulate more than 15 replays at 1 time; the device is designed so that accumulated free replays may only be discharged by reactivating the device for 1 additional play for each accumulated free replay; and the device makes no permanent record directly or indirectly of the free replays awarded."

Early in 1982, officers of the Michigan Liquor Control Commission became aware that the Sanford Eagles Club had a "draw poker" video machine in the club. This machine has five windows. When twenty-five cents is inserted in the

machine, a playing card appears in each window. Below each window is a button. If a player is dissatisfied with the card first appearing in a window, he may press the button under that card and the first card will disappear and be replaced by another card.

The machine has two counters on the inside, one which keeps track of the number of quarters placed into the machine and the other which keeps track of the number of free replays erased off the machine without playing them. The device also has a key mechanism which can erase free replays without the replays being played.

Once a satisfactory hand is established, the game is played as five-card draw poker. When certain hands are obtained, credits are given which entitle the player to free plays.

On March 30, 1982, the local inspector for the MLCC, Robert Basket, and his supervisor, Donald French, went to the Sanford Eagles club and played the machine. Supervisor French won 54 free games on that date.

The officers asked the bartender, Lydia Oswald, if the games could be traded for cash. She informed them that the Eagles did not pay off in cash but only in free replays.

On May 25, 1982, the same Liquor Control Commission officers returned to the club and played the machine. After this the officers confiscated the machine as a gambling device and issued a complaint with the Michigan Liquor Control Commission against the Sanford Eagles Club. A hearing was held before Hearing Commissioner Andrew Metcalf, Jr., who rendered an opinion on December 1, 1982, finding the machine to be a game "partly of skill and partly of chance" and an unlawful gambling device under MCL 750.303(1) and 1980 AACS R 436.1013(2). Commissioner Metcalf also ruled that Automatic Music and Vending Corporation could not intervene in the hearing as it was not an involved party. The

commissioner ordered a fine of $250 and costs. He did not confiscate the machine.

Commissioner Metcalf's decision was upheld by the commission on appeal in January, 1983.

Automatic Music then applied to the circuit court for Ingham County for an order of superintending control to review the actions of the commission. Judge Robert Holmes Bell, in a terse order, reversed the commission and found that free replays do not constitute a reward and are not gaming as defined by MCL 750.303; MSA 28.535.

The commission appealed to this Court.

Four issues are raised:

I. Whether Automatic Music may petition the circuit court for an order of superintending control.

II. Whether a "draw poker" video game is a gaming device within the meaning of MCL 750.303(1); MSA 28.535(1).

III. Whether the statute constitutionally denies equal protection of the United States and Michigan Constitutions.

IV. Whether MCL 750.303; MSA 28.535 is unconstitutionally vague.

I

May Automatic Music petition the circuit court for superintending control?

We conclude that Automatic Music, while not directly a party to the dispute, was aggrieved by the action of the commission and should be allowed to intervene under GCR 1963, 711.2

It is well settled that an order of superintending control does not supersede the use of normal appellate procedures. *Detroit* v *Recorder's Court Judge*, 104 Mich App 214, 222; 304 NW2d 829 (1981); GCR 1963, 711. See, also, *Beer* v *Fraser Civil Service Comm*, 127 Mich App 239, 242; 338 NW2d 197 (1983).

Automatic Music was not a party to the commission's administrative proceedings and did not have a right of appeal. However, it was that company's machine that was confiscated and, therefore, it was aggrieved in this action and superintending control should be available to it. *Kassab* v *Acho*, 125 Mich App 442, 451; 336 NW2d 816 (1983). Further, the decision in this case will affect its total business with like machines. Superintending control is a proper remedy when general policies of an inferior tribunal are being reviewed. *Detroit* v *Recorder's Court Judge*, *supra*.

We conclude that it was proper to allow Automatic Music to intervene.

II

Is a "draw poker" video game a gaming device?

MCL 750.301-750.315; MSA 28.533-28.547 is part of a statutory scheme governing gambling. The purpose of the statutory scheme is to suppress gambling, an activity determined to be "injurious to the morals and welfare of the people". *Michigan ex rel Comm'r of State Police* v *Nine Money Fall Games*, 130 Mich App 414, 419; 343 NW2d 576 (1983) citing *Parkes* v *Judge of Recorder's Court*, 236 Mich 460, 465-466; 210 NW 492 (1926). Under this particular section, it is not necessary to determine whether the game under consideration is one of skill or of chance because the statute makes no distinction as to either kind of game. *Michigan ex rel Comm'r of State Police* v *One Helix Game*, 122 Mich App 148, 156; 333 NW2d 24 (1982), citing *Henry* v *Kuney*, 280 Mich 188, 192; 273 NW 442

(1937). Gambling occurs whenever there is a chance for profit if the player of the game is skillful and lucky.

The question to be resolved in this case is whether free plays are "reward", "profit", or a "thing of value". The circuit judge decided that the right to free play is not a "reward". In so doing, he acknowledged: "The Court is not unmindful of a couple of antiquated Supreme Court decisions, dealing with different machines, under different circumstances, at a different time culturally in our nation."

MCL 750.303(2); MSA 28.535(2) was passed in 1975 and provides in part:

> "(2) This section shall not apply to a mechanical amusement device which may through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost * * *."

This language clearly appears to be a response of the Legislature to *Oatman* v *Port Huron Chief of Police*, 310 Mich 57; 16 NW2d 665 (1944), of which the Legislature is presumed to have been aware.

While both the commission and Automatic Music agree that the "draw poker" video game allows more than 15 replays as provided in that section, it is clear that the Legislature by the enactment of § 303(2) intended to legalize machines which are games having an element of skill and where the "reward" is limited to free games and does not include pecuniary or merchandise rewards.

This was recognized by another panel of this Court in *People* v *Palazzolo*, 62 Mich App 140; 233 NW2d 216 (1975).

III

Does MCL 750.303(2); MSA 28.535(2) deny equal protection of the laws under the United States and Michigan Constitutions and is it void for vagueness?

The purpose of the statute is to suppress gambling, an activity "injurious to the morals and welfare of the people". *Michigan ex rel Comm'r of State Police* v *Nine Money Fall Games*, *supra*, p 419.

In the present case, we are not dealing with a suspect class or a fundamental personal right and the test is whether the legislation bears a reasonable relationship between the statutory classification and the public purpose in enacting the statute. *Shavers* v *Attorney General*, 402 Mich 554, 612-614; 267 NW2d 72 (1978).

Automatic Music urges that by allowing machines with 15 or less replays to be exempt and by denominating this game, a game of mixed skill and chance, a per se gambling device while treating other games of skill and chance as legal is a denial of equal protection.

It is clear that the Legislature by the passage of subsection 303(2) clearly amended the then law of Michigan by legalizing those machines which require an element of skill. The difficulty lies in the balance of the section which reads:

> "* * * if the mechanical amusement device is not allowed to accumulate more than 15 replays at 1 time; the device is designed so that accumulated free replays may only be discharged by reactivating the device for 1 additional play for each accumulated free replay; and the device makes no permanent record directly or indirectly of the free replays awarded."

This panel finds this subsection vague and arbitrary as did the *Palazzolo* panel. We are unable to fathom what the Legislature meant by 15 games. What is meant by one replay? What is the purpose of prohibiting a "knock off" button or making recordation of free games illegal? Why is 15 free games legal and 16 free games illegal?

These are all questions which in our opinion make this portion of the act unconstitutional.

In *People* v *Austin*, 301 Mich 456, 463; 3 NW2d 841 (1942), the Court said:

> "'[A] statue which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Connally* v *General Construction Co*, 269 US 385, 391; 46 S Ct 126; 70 L Ed 322 (1926)."

We therefore hold that MCL 750.303(2); MSA 28.535(2) is applicable to this case and is constitutional insofar as it legalizes mechanical amusement devices which through the application of an element of skill reward the player with the right to replay the mechanical device at no additional cost.

The balance of that subsection we find to be arbitrary and vague and, therefore, unconstitutional.

We affirm the circuit court.

D. E. Holbrook, Jr., P.J., concurred.

Cynar, J. *(concurring)*. I concur with the majority and also feel compelled to write separately because we are asked to rule on a most trifling matter. Whatever the public attitude may have been in 1944, since then we have seen the growth of horse racing and other gambling, the State of Michigan sponsoring a multi-million dollar gambling program, and not only bingo but earlybird bingo being approved. Nonetheless, the Michigan Liquor Control Commission sent its investigators to the

Fraternal Order of Eagles, supplied with quarters, to play the machine. The investigator played the machine and obtained some replays. The machine was confiscated because it was not a game of skill, gave replays and was thus determined to be a gambling device. I can picture the investigators, pursuant to their traveling orders, attending charitable and community events, scientifically evaluating various devices for violations. Oh, what victories will be gained by locating and confiscating devices which reward the player with a replay. With this in mind, I find the majority's reasoning compelling for constitutional as well as practical reasons.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

AUTOMATIC MUSIC AND VENDING CORPORATION, an Ohio corporation, and FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677,
Plaintiffs,

-vs-

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendants.

No. 83-31267-AA

Hon. Robert Holmes Bell

ORDER

At a session of said Court held in the City of Mason, County of Ingham, State of Michigan, on the 3 day of June, 1983.
PRESENT: Hon. Robert Holmes Bell

THIS MATTER having come before this Court upon Plaintiff's Request for Superintending Control, Briefs having been filed, oral argument having been heard and the Court being fully advised; the Court hereby finds that the Hearing Commissioner erred and the Appeal Board erred and therefore;

IT IS HEREBY ORDERED that the Court takes superintending control of the above entitled matter;

IT IS FURTHER ORDERED that the Hearing Commissioner's Order of December 1, 1982, is hereby reversed and held for naught;

IT IS FURTHER ORDERED that the Appeal Board's decision of January 19, 1983, is hereby reversed and held for naught;

IT IS FURTHER ORDERED that the video poker machine admitted as Exhibit 1 in the proceedings before the Defendant gives free replays, and that a free replay or any number of replays does not constitute reward and does not constitute gaming in violation of MCLA 750.303 and is therefore not illegal;

IT IS FURTHER ORDERED that the Defendant return to the Plaintiff, the video poker machine and the money found therein which was entered as Exhibit 1 in the proceedings before the Defendant;

IT IS FURTHER ORDERED that the fine heretofore levied against the Fraternal Order of Eagles, Sanford Aerie #3677 shall be returned to the Fraternal Order of Eagles, Sanford Aerie #3677, forthwith.

/s/ ROBERT HOLMES BELL
CIRCUIT COURT JUDGE

APPROVED AS TO FORM:

/s/ DANIEL S. COOPER
DANIEL S. COOPER, P.C. (P 12201)
Attorney for Plaintiffs

/s/ LARRY I. BRYA
LARRY BRYA (P 26088)
Assistant Attorney General
Attorney for Defendants

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

AUTOMATIC MUSIC AND VENDING CORPORATION, an Ohio corporation and FRATERNAL ORDER OF EAGLES, SANFORD AERIE #3677,
Plaintiffs,

-vs-

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendant.

Case No.
83-31267-AA

CIRCUIT COURT BENCH OPINION OF MAY 18, 1983

COOPER AND FINK
Attorneys for Plaintiffs
30200 Telegraph, Suite 230
Birmingham, Michigan 48010
313/646-1717

CIRCUIT COURT'S BENCH OPINION

COURT: The Court grants the following order. The Court grants the motion for superintending control, and this Court having reviewed this matter and well drafted briefs and articulated arguments finds that in granting the superintending control should reverse the Liquor Control Commission on the question of whether or not the draw poker machine is a gambling device as construed by the Statute 75.303 [sic] that we have heard about today.

This Court finds in particular, that it, that as a matter of law, the Liquor Control Commission has erred in determining that this device is a gambling device. That in several particulars, and just a few areas, the Court will comment. One is there is an implied assumption, that the [23] giving of something of value, is that of money, or something synanamous [sic] with money. There appears to be nothing in the record, to indicate in this manner that a giving of a replay is an equivelent [sic] of money. Certainly, money might be used to acquire a chance to play, but there is no testimony whatever that this Court can find, nor has there been any cited, which shows that a replay situation is a situation of financial gain to the person playing.

Now, that is to me a very important distinction, if in fact a person got a won [sic] and opportunity using partially chance, and partially skill to have 10 replays, and the machine were set up in such fashion that a token dropped out of one person's hand and taken to the cashier and a person received money for it, then one could argueably [sic] find that a — that of gambling. But, at most, the only reward, which this one draw poker will give is the opportunity to play again.

Now, I find particularly, ludicrous, as a public policy, is the argument that one can spend all of their money; ones pay check on gambling. One only has to listen to the radio or open

up the newspaper to find the Michigan Lottery is encouraging people to spend their paychecks and more on Michigan Lottery Tickets. So, I find it ludicrous that the State of Michigan should be enforcing a public policy, of gambling device such as this, on an argument that people will [24] spend their money. Maybe they won't spend their money on State Lottery Tickets, but that is part hopefully our free society, so, therefore, Mr. Cooper, you will draw an order, in which the Court finds as a matter of law, based upon the records below, together with the arguments that have been made here, that this particular machine on this particular factual development, be for the Liquor Control Commission, is found to be not be a gambling device, under 75.303. [sic].

Now, I want to be very careful and state that this particular order of superintending control is to have no other precedential value, than ruling on this particular device, and this particular factual situation as developed below. No other precedential value. You will draw the order.

* * *

(WHEREUPON, THIS MATTER WAS CONCLUDED).

FRATERNAL ORDER OF EAGLES
SANFORD AERIE # 3677
400 W. SAGINAW ROAD
SANFORD, MICHIGAN 48657

January 19, 1983

Complaint No.
2-0704

APPEAL BOARD DECISION

The Appeal Board adopts the Findings of Fact and Conclusions of Law of the Hearing Commissioner and, therefore AFFIRMS his order of December 1, 1982.

In regards to the disposition of the Draw Poker Machine and the Money found therein, the Hearing Commissioner ordered that "... upon concurrence of the Administrative Commissioners" the "machine or machines confiscated be returned to its rightful owner or owners, together with the money found therein."

The Appeal Board, however, accepts the argument made in the Answer to Request for Violation Appeal Hearing and in the oral arguments of the Assistant Attorney General that the gambling paraphernalia and monies should be disposed of by proper court order.

STATE OF MICHIGAN
MICHIGAN LIQUOR CONTROL COMMISSION

IN RE: Fraternal Order of Eagles
Sanford Aerie # 3677
400 W. Saginaw
Sanford, MI
Complaint No. 2-0704

OPINION

BY: COMMISSIONER
Andrew L. Metcalf, Jr.

STATE OF MICHIGAN
MICHIGAN LIQUOR CONTROL COMMISSION

IN RE: Fraternal Order of Eagles
Sanford Aerie # 3677
400 W. Saginaw
Sanford, MI
Complaint No. 2-0704

OPINION
FINDINGS OF FACT

After reviewing all of the testimony and admitted Exhibits, the Commission finds as follows:

On May 25, 1982, Liquor Control Commission Enforcement Supervisor Donald French and Investigator Robert Basket entered the licensed premises at 209 Railway Street, Sanford, Michigan, and found two Electronic Video Draw Poker Machines on the premises. Supervisor French proceeded to play one machine for approximately ten minutes. After informing Eagles' personnel that the machines were illegal gambling devices, Supervisor French and Investigator Basket seized the machines as evidence.

I find that the Electronic Draw Poker Machine is an electronic device that uses electricity for power. Upon the insertion of a quarter by the player, the machine will become activated. The player then depresses the "deal" button and the video screen exhibits five (5) cards selected from a computerized 52 card "deck." If a pair of aces or better appears among these five cards, the screen blinks "a winner" and the player is awarded a certain number of skill points. Each skill point is worth one free replay. The player has the option to discard up to all five cards and, by depressing the "draw" button, obtain new cards. Various winning combinations are noted on the

face of the machine and winning hands achieve varying amounts of skill points. A straight flush would entitle a player to as much as 50 skill points and as stated before, each point allows one free replay.

I further find that Supervisor French attempted to get paid in cash for skill points he had accumulated on the machine. The bartender informed Mr. French that the Eagles did not pay off in cash for points awarded on the machine.

From the testimony of Dr. Kadane and Dr. Feldman, both expert witnesses, I find that the Electronic Video Draw Poker Machine is a game of part chance and part skill although both experts testified they find two different types of strategy being applied in maximizing the amount of skill points a player could achieve. I find that a player could obtain as many as 50 free replays by just dropping a quarter in the machine and receive a winning hand on the first deal. This would not take very much skill at all.

However, I also find that a player would enhance his ability to achieve skill points if the player had a basic knowledge of the game of poker.

CONCLUSIONS OF LAW

This case is before the Michigan Liquor Control Commission on Complaint No. 2-0704 that states: "That the Licensee on the 25th day of May, 1982, did itself, or by its clerk or employee: allow unlawful gambling devices on the licensed premises, to wit: a draw poker amusement device, the operation of which is prohibited by MCL 750.303 and contrary to Rule R 436.1013(2), as promulgated in the Michigan Administrative Code."

Our Rule R 436.1013(2) reads as follow:

"R 436.1013 Gambling and gambling devices prohibited.

"(2) A licensee shall not allow any gambling devices on the licensed premises which are prohibited by the statutes of this State."

This Complaint is by necessity based upon MCL 750.303(1) which reads:

"750.303 Gaming room or table, keeping for hire, gain, or reward; mechanical amusement devices; slot machines.

"Sec. 303(1) A person who *** for hire, gain, or reward, keeps or maintains a gaming room, *** gaming table *** game of skill or chance, or game partly of skill and partly of chance, used for gaming, or who *** permits a gaming room, or gaming table, or game to be kept, maintained, or played on premises occupied or controlled by the person, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or *** a fine of not more than $1,000.00. A person who aids, assists, or abets in keeping or maintaining of a gaming room, gaming table, or game, is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years, or *** a fine or not more than $1,000.00."

I, therefore, must determine whether or not the so-called Electronic Video Game Machines called "Draw Poker" or "Roman Tallies" or the likes thereof fall within the prohibition outlined in MCL 750.303(1).

I assume, and licensee's counsel seems to agree on page 15 of his brief, that Section 303(1) was enacted for the public purpose of preventing gambling. The Commission adoption and promulgation of Rule R 436.1013(2) was to prevent gambling paraphernalia or equipment upon any licensed premises that falls within the control of this Commission.

It may well have been a better test of the law regarding the use of these Electronic Draw Poker Game Machines to have

had several county prosecutors charge the owners of the machines here at issue and the licensees with a misdemeanor under Section 303(1) punishable by imprisonment for not more than two years or a fine of not more that $1,000.00. However, this has not occurred as yet, and I must, therefore, make my decision without the aid of a criminal prosecution as a test case.

Black's Law Dictionary states "gaming" and "gambling" in statutes are similar in meaning. I quote from page 3 of licensee's brief:

> "'Gaming' and 'gambling' in statutes, are similar in meaning and either one comprehends the idea that by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the conclusion of premises agreed, to be transferred from a loser to a winner."

Since the Commission seeks to discourage gambling on the premises of our licensees, I have only to determine if the machine "Draw Poker" is of a different nature than "Draw Poker" played with cards at the hands of a dealer, skilled or otherwise. *I find no difference!* It seems to me it makes no difference as to who is the dealer: the bartender, a hired dealer, a dealer who gets the deal by passing the hand around the table of players, or an electronic dealer as we have in this case. Is "draw poker" gambling? It is assumed that the dealer, unless he is a master at cheating, only cuts, shuffles and passes out the cards to the player or players and then replaces the throw away cards with new ones. In what we would refer to as real draw poker, the highest hand usually wins "after betting" and gets the pot as reward. In the electronic game of "draw poker" with only one player, the player wins only skill points (free replays) if the player's final hand before or after the draw is sufficiently high enough to get skill points (free replays).

It is well established that a "free replay" is sufficient to become a reward. *Oatman* v *Port Huron Chief of Police*, 310 Mich 57 60; 16 NW2d 665 (1944). No one argues that 25¢ (twenty-five cents) to play is not consideration. The remaining issue appears to be what is meant by "game of skill or chance, or game partly of skill and partly of chance" used for gaming or gambling.

Both the Attorney General and Counsel for the Licensee have presented expert testimony on this issue. Each expert has a very learned background in the areas of mathematics and statistics. Each expert admitted upon questioning by the Commissioner that this so-called game of electronic "draw poker" is a game of partly skill and partly chance. As an example, there is practically no skill involved in putting a quarter into the machine to receive a play credit. However, once the player depresses the deal button and receives 5 (five) cards, then he must rely upon some skill or knowledge of poker to determine which cards to discard or keep. If the player elects to discard any cards, then the chance factor enters into play because it is undetermined at that point what new cards he will receive in a redeal. Section 750.303(1) prohibits a "game partly of skill and partly of chance."

I, therefore, conclude that the so-called video electronic game called "Draw Poker" and "Roman Tallies" and the likes thereof are unlawful gambling devices within the meaning of Section 750.303(1) and Rule R 436.1013(2) and, therefore, cannot be upon the premises of this licensee or any other licensee within the State of Michigan who is under the control of the Michigan Liquor Control Commission.

I do not believe that Section 750.303(2) is applicable in this action since Section 750.303(2) is an exclusion to Section 750.303(1) and by legislative history, it applies only to pinball machines and their modern day off springs. I do not feel that electronic dice, black jack or poker would be applicable under Section 750.303(2).

STATE OF MICHIGAN
MICHIGAN LIQUOR CONTROL COMMISSION

IN RE: Fraternal Order of Eagles
Sanford Aerie # 3677
400 W. Saginaw
Sanford, MI
Complaint No. 2-0704

ORDER

Because of the recent introduction of these electronic devices into the State of Michigan and their novelty effect on the public, and the fact that this is an administrative proceeding as opposed to a criminal prosecution, I find that there is no need to issue a harsh and severe penalty against the Licensee.

I, therefore, deny the request of the Attorney General to tax actual costs of these proceedings against the Licensee pursuant to Rule R 436.1911.

I order penalty in this matter to be a $250.00 fine, or 12 days suspension in the event that the fine is not paid within 20 days of receiving this Order.

It is further ordered, upon concurrence of the Administrative Commissioners, that the machine involved or machines confiscated be returned to its rightful owner or owners, together with the money found therein.

Dated: December 1, 1982

/s/ ANDREW L. METCALF, JR.

Andrew L. Metcalf, Jr.
Commissioner

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STATE OF MICHIGAN
IN THE SUPREME COURT

AUTOMATIC MUSIC AND VENDING CORPORATION, an Ohio Corporation, and FRATERNAL ORDER OF EAGLES, SANFORD AERIE, #3677,
Appellants,

v

MICHIGAN LIQUOR CONTROL COMMISSION,
Appellee,

Mich. Supreme Court
No. 76285

Court of Appeals
No. 71889

Circuit Court
No. 82-0704

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY given that AUTOMATIC MUSIC AND VENDING CORPORATION, an Ohio Corporation and FRATERNAL ORDER OF EAGLES, SANFORD AERIE, #3677, the Appellants above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan, reversing the decision of the Michigan Court of Appeals, entered in this action on November 24, 1986.

This appeal is taken pursuant to 28 USC §1257(2).

COOPER AND FINK

By: _____
DAVID H. FINK, P.C. (P28235)
Counsel of Record

By: _____
DANIEL S. COOPER, P.C. (P12201)

By: _____
MARK J. ZAUSMER (P31721)

Attorneys for Appellants
412 W. Ionia
Lansing, MI 48933
(517) 372-2020

Dated: January 27, 1987

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

AUTOMATIC MUSIC & VENDING CORPORATION, an Ohio corporation, and FRATERNAL ORDER OF EAGLES, SANFORD AERIES, #3677,
Plaintiffs,

No. 83-31267 AA

Judge Bell

-vs-

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendant.

COMPLAINT FOR SUPER-INTENDING CONTROL

COOPER & FINK
412 W. Ionia
Lansing, Michigan 48933
(517) 372-2020

DATED: March 3, 1983

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

IN RE: No. 83-31267 AA

AUTOMATIC MUSIC & VENDING CORPORATION, an Ohio Corporation, and FRATERNAL ORDER OF EAGLES, SANFORD AERIE, #3677 Judge Bell

COMPLAINT FOR SUPER-INTENDING CONTROL

NOW COMES, AUTOMATIC MUSIC AND VENDING CORPORATION and SANFORD EAGLES, by and through their attorneys COOPER AND FINK, and files this Complaint for equitable relief and injunctive relief and petitions for review pursuant to super-intending control and for its Complaint states as follows:

1. That AUTOMATIC MUSIC AND VENDING CORPORATION is an Ohio corporation which owns amusement devices known as Video Poker machines and Roman Tallies' machines (hereinafter "video game machines").

2. That Licensee, SANFORD EAGLES, is the holder of a liquor license and is subject to the supervision and licensing authority of MICHIGAN LIQUOR CONTROL COMMISSION.

3. That the MICHIGAN LIQUOR CONTROL COMMISSION is a State agency charged with enforcement of statutes and regulations related to facilities with liquor licenses with its principal office located in the City of Lansing, County of Ingham, State of Michigan.

4. That on May 25, 1982, LIQUOR CONTROL COMMISSION Supervisor, Donald French, and Investigator

Robert Basket entered the premises of SANFORD EAGLES, and confiscated one Video Poker machine which was owned by AUTOMATIC MUSIC AND VENDING CORPORATION.

5. That jurisdiction is invoked pursuant to MCLA 436.20.

5a. That on May 25, 1982, a violation was issued to Plaintiff SANFORD EAGLES alleging that the Video Poker machine was an unlawful gambling device within the meaning of MCLA 750.303 and R. 436.1013. (See EXHIBIT A).

6. That Video Poker machines were confiscated from numerous licensed establishments throughout the State with violations being issued to facilities from which these machines were confiscated.

7. That on September 17, 1982 correspondence was forwarded to the LIQUOR CONTROL COMMISSION from attorneys for Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION advising the Commission that Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION has an ownership interest in the seized machines, requesting full due process hearings regarding each machine, and requesting that the machines be kept in a safe and reasonable manner until all matters related to the Video Poker machines were resolved. (See EXHIBIT B).

8. That on September 23, 1981, in an attempt to get Defendant, MICHIGAN LIQUOR CONTROL COMMISSION to return the confiscated machines, Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION, pursuant to the Administrative Procedures Act, requested a declaratory ruling on the following issues:

A. Were the Draw Poker video machines considered gambling devices per se by the Liquor Control Commission?

B. Were the Draw Poker video machines considered slot machines by the LIQUOR CONTROL COMMISSION?

C. Under what statutory authority were these machines confiscated?

D. In the event that no determination had been made regarding whether they were per se gambling devices or slot machines, what reasons the Commission had for holding these machines and not returning them to their rightful owner? (See EXHIBIT C).

9. That on October 6, 1982 correspondence was received from the MICHIGAN LIQUOR CONTROL COMMISSION advising that the Commission would consider the declaratory ruling request on October 13, 1982. (See EXHIBIT D).

10. That on October 7, 1982 a hearing was commenced in Bridgeport, Michigan on the alleged violation of Plaintiff, SANFORD EAGLES.

11. That on October 13, 1982 the MICHIGAN LIQUOR CONTROL COMMISSION did not rule on the declaratory ruling due to the fact that the issue was before the Commission in contested case proceedings and that the matter was being addressed by the Hearing Commissioner and the Appeal Board. (See EXHIBIT E).

12. That the hearing commenced in Bridgeport, Michigan relative to the SANFORD EAGLES was completed in Lansing, Michigan on October 20, 1982.

13. That pursuant to Commissioner Andrew Metcalf's request, Briefs were filed by Plaintiff, SANFORD EAGLES, and the Attorney General.

14. That on December 1, 1982 an Opinion and Order was entered by Commissioner Andrew Metcalf, Jr. finding that the Video Poker machines were unlawful gambling devices, denying the request of the Attorney General to tax proceedings, ordering a $250.00 fine or 12 day suspension, and

ordering that the machines involved and the money found therein be returned to their rightful owners. (See EXHIBIT F).

15. That pursuant to R. 436.1917 Plaintiff, SANFORD EAGLES, requested a Violation Appeal Hearing, said request being granted by the Appeal Board.

16. That the Violation Appeal Hearing was held in Lansing, Michigan on January 11, 1983.

17. That on January 19, 1983 the Commission affirmed Commissioner Metcalf's findings of fact and conclusions of law, and further ordered that the machines and monies be held pending an Order of a State Court. (See EXHIBIT G).

18. That Defendant, MICHIGAN LIQUOR CONTROL COMMISSION is bound by all laws in the State of Michigan, including the Administrative Procedures Act, as amended.

19. That MCLA 750.303 violates the due process clause of the Michigan and United States Constitutions, said statute being void for vagueness.

20. That MCLA 750.303(1) violates the equal protection clauses of the United States and Michigan Constitutions as to Video game machines.

21. That MCLA 750.303(2) violates the equal protection clauses of the United States and Michigan Constitutions, as amusement devices giving less than 15 replays are treated differently than machines giving more than 15 replays, although no natural distinguishing characteristics between these classifications exist.

22. That the actions of Defendant, MICHIGAN LIQUOR CONTROL COMMISSION, as to all Video Poker machines owned or operated by Plaintiff, AUTOMATIC

MUSIC AND VENDING CORPORATION in the State of Michigan:

A. Were in violation of the Constitution.

B. Were in excess of the statutory authority of or jurisdiction of the agency.

C. Were made upon unlawful procedures resulting in material prejudice to a party.

D. Were arbitrary, capricious or clearly in abuse or unwarranted exercise in discretion.

E. Were in violation of a statute.

F. Were not supported by competent, material and substantial evidence on the whole record.

23. That Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION will suffer severe and irreparable injury, loss and harm if the actions of the Defendants are not reversed.

24. That if Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION is not allowed to operate its business, including the placing of video game machines in licensed premises throughout the State of Michigan, tremendous consequences will be incurred including loss of reputation, good will and profit.

25. That if the Order of the MICHIGAN LIQUOR CONTROL COMMISSION is allowed to stand, Plaintiff's entire business in the State of Michigan will be totally decimated and they will not be able to continue.

26. That there is no adequate remedy at law.

WHEREFORE, Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION prays that:

A. That this Honorable Court enter an Order declaring that absent any evidence of use for gambling, Plaintiffs did not violate MCLA 750.303(1).

B. That this Honorable Court declare that the video game machines are not per se gambling devices.

C. That this Honorable Court enter an Order declaring that MCLA 750.303 violates the due process clause of the Michigan and United States Constitutions being void for vagueness.

D. That this Honorable Court enter an Order declaring that MCLA 750.303(1) violates the equal protection clauses of the United States and Michigan Constitutions as video game machines, if declared illegal, would be treated differently than countless other similar amusement devices.

E. That this Honorable Court enter an Order declaring that MCLA 750.303(2) violates the equal protection clauses of the United States and Michigan Constitutions, as amusement devices giving less than 15 replays are treated differently than machines giving more than 15 replays, although no natural distinguishing characteristics between these classifications exist.

F. That this Honorable Court Order and Compel Defendant to return all video game machines, money contained therein, and other related property seized from all facilities to its rightful owner, Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION.

G. That this Honorable Court enter an Order consolidating with the above captioned case, all cases in which video game machines owned by AUTOMATIC MUSIC AND VENDING CORPORATION have been seized by Defendant.

H. That this Honorable Court enter an Order enjoining all further administrative proceedings relative to video game machines owned by Plaintiff, AUTOMATIC MUSIC AND VENDING CORPORATION, or in the alternative, requiring the Commission to use the expert testimony of Dr. Joseph Kadane in the SANFORD EAGLES matter in all other related proceedings.

I. That this Honorable Court enter a permanent injunction allowing video game machines to be used in licensed facilities in the State of Michigan.

J. That this Honorable Court enter an Order restraining or enjoining Defendant, MICHIGAN LIQUOR CONTROL COMMISSION, its employees or any other person from interfering, harrassing, confiscating machines or in anyway preventing Plaintiffs from continuing operation of their business and unrestrained use of said video poker machines and/or Roman Tallies or any other video game device at any establishment or business in the State of Michigan.

K. That this Court enter a Temporary Restraining Order ordering the Commission or any persons, to return all machines and monies immediately consistent with Commissioner Metcalf's ruling.

L. That this Honorable Court order whatever shall be in the nature of equity in this matter.

COUNT II

27. That Plaintiff incorporates by reference all of the allegations contained in Paragraphs 1-26 as though fully set forth herein.

28. That the above mentioned action taken by the Defendant, MICHIGAN LIQUOR CONTROL COMMISSION, against Plaintiff, SANFORD EAGLES:

A. Were in violation of the Constitution.

B. Were in excess of the statutory authority of or jurisdiction of the agency.

C. Were made upon unlawful procedures resulting in material prejudice to a party.

D. Were arbitrary, capricious or clearly in abuse or unwarranted exercise in discretion.

E. Were in violation of a statute.

F. Were not supported by competent, material and substantial evidence on the whole record.

WHEREFORE, Planintiff, SANFORD EAGLES prays:

A. That this Honorable Court order and declare that Defendant's Order of Violation be set aside.

B. That this Honorable Court enter an Order declaring that absent any evidence of use for gambling, Plaintiffs did not violate MCLA 750.303(1).

C. That this Honorable Court declare that the Video Poker machines are not per se gambling devices.

D. That this Honorable Court enter an Order declaring that MCLA 750.303 violates the due process clause of the Michigan and United States Constitutions, said statutes being void for vagueness.

E. That this Honorable Court enter an Order declaring that MCLA 750.303(1) violates the equal protection clauses of the United States and Michigan Constitutions as Video Poker machines, if declared illegal, would be treated differently than countless other similar amusement devices.

F. That this Honorable Court enter an Order declaring that MCLA 750.303(2) violates the equal protection clauses of the United States and Michigan Constitutions, as amusement devices giving less than 15 replays are treated differently than machines giving more than 15 replays, although no natural distinguishing characteristics between these classifications exist.

Respectfully submitted,

BY: _____

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STATE OF MICHIGAN
DEPARTMENT OF COMMERCE
LIQUOR CONTROL COMMISSION

IN RE:

FRATERNAL ORDER OF EAGLES
SANFORD AERIE NO. 3677
209 Railway Street
Sanford, Michigan

LICENSES: Club-SS, D

CASE NO. 2-0704

APPEARANCES:

ASSISTANT ATTORNEY GENERAL LARRY BRYA
Appearing in behalf of the Licensing and Enforcement Division of the Michigan Liquor Control Commission

MARK J. ZAUSMER, ESQ., 30200 Telegraph Road, Suite 230, Birmingham, Michigan and 412 West Ionia Street, Lansing, Michigan
Appearing in behalf of the Licensed Club

ALSO PRESENT:

For the Licensed Club

Ronald Letts, President
Lawrence Waskevich, Secretary
Lydia Oswald, Stewardess

For the Licensing and Enforcement Division of the Michigan Liquor Control Commission

Supervisor Donald French, Enforcement Division, MLCC
Investigator Robert L. Basket, Enforcement Division, MLCC

Proceedings had and testimony taken in the above-entitled matter before the HONORABLE COMMISSIONER ANDREW METCALF, in the Council Chambers of the Bridgeport Charter Township Governmental Center, in the City of Bridgeport, Michigan, on Thursday, 07 October

1982, commencing at or about 12:25 o'clock p.m., pursuant to the Michigan Liquor Control Commission's Hearings and Appeals Practice Rules and the Michigan Liquor Control Act.

REPORTED BY:

Beverly J. Yerge, CSMR-2215
Hearings Reporter 10
Hearings and Appeals Division,
Michigan Liquor Control Commission

[37]

MR. ZAUSMER: Thank you.

Q (By Mr. Zausmer) Mr. French, did you see anybody — not just employees of the Sanford Eagles — anybody in that club either on March 30th or on May 25th pay money to anybody, including yourself, Miss Wendt or Mr. Basket, pay any money for unused credits?

A No, sir.

Q Did you see anybody at the Sanford Eagles on March 30th or May 25, 1982 do any gambling on that machine?

A By our interpretation, we assume the use of it is gambling, to that extent. If you put the word "money" in there, I did not see that.

Q The machine doesn't pay off; right?

A Right.

Q You didn't see anybody in the club pay off?

A No, sir.

Q You didn't see any employees of the club pay off?

A No, sir.

Q You didn't see any cash exchange hands related to that machine, except for somebody putting a quarter in the machine and playing the machine; right?

A That is correct.

Q And if somebody got a hundred credit points, as far as you know, they just left them on the machine?

A I didn't see anybody paid off with credit points on the machine.

Q Other than somebody playing the machine, playing poker, earning that, [38] those credit points and being done with it, did you see anything else? Did you see anything done with the credit points other than being used to keep playing?

A Other than being used as replays.

Q That's the only way you saw them used?

A Correct.

Q That's referring to both March 30th and May 25th; right?

A Correct.

Q Just so I'm very clear on this point, you don't have any personal knowledge of any money payoffs or anything else being done with those credit points other than them being used for replays?

A I have no personal knowledge of that.

Q Now, Mr. French, did you at any time, either on March 30th or May 25th, 1982 attempt to seek financial — meaning money — reimbursement for your credit points?

A Yes, sir, on March 30th.

Q On March 30th?

A Yes.

Q Who did you ask for reimbursement for your credit points?

A I believe it was Lydia Oswald.

Q This would be the bartender?

A Yes.

Q How many times did you ask her for reimbursement for your credit points?

[39]

A Once.

Q Were you in Mr. Basket's company that date?

A No, sir.

Q In Miss Wendt's company?

A Miss Wendt's.

Q Do you know if she heard you ask Lydia Oswald for that reimbursement?

A I couldn't testify whether she heard me or not.

Q Do you recall what your exact words were to the bartender in asking for reimbursement?

A I do not know the exact words.

Q Well, can you paraphrase for me?

A Essentially, I asked how much that number of skill points was worth.

Q All right. And your intent was to see if you could get somebody — the bartender — to pay you money for the skill points that you had accumulated on that machine, right?

A That is correct.

Q Is that right?

A That is correct.

Q What was Miss Oswald's response?

A She said that they did not pay off on the machine in cash.

Q In fact, it's true — Isn't it? — Mr. French, that she told you that machine is only played for amusement in that facility?

A That would be a paraphrase of it, "It's only played for replays", something to that effect, yes.

[40]

Q That's what she said; right?

A Yes.

Supreme Court, U.S.
FILED
MAR 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1370

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

AUTOMATIC MUSIC AND VENDING CORPORATION,
an Ohio Corporation, and
FRATERNAL ORDER OF EAGLES,
SANFORD AERIE, #3677,

Appellants,

v

MICHIGAN LIQUOR CONTROL COMMISSION,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

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Dated: March 17, 1986

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QUESTIONS PRESENTED

I

IS THE EXCLUSION OF A MECHANICAL DEVICE FROM A GENERAL GAMING PROHIBITION BASED ON THE NUMBER OF FREE REPLAYS ALLOWED TO ACCUMULATE ON A MACHINE AT ONE TIME, A VIOLATION OF EQUAL PROTECTION?

II

IS THE STATUTORY LANGUAGE CONTAINED IN MCL 750.303; MSA 28.535 UNCONSTITUTIONALLY VAGUE?

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No. 86-1370

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

AUTOMATIC MUSIC AND VENDING CORPORATION,
an Ohio Corporation, and
FRATERNAL ORDER OF EAGLES,
SANFORD AERIE, #3677,

Appellants,

v

MICHIGAN LIQUOR CONTROL COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

The Michigan Liquor Control Commission, Appellee, respectfully moves this Court to dismiss the appeal or, in the alternative, to affirm the decision of the Michigan Supreme Court because the appeal does not present a substantial federal question and because it is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to merit further argument.

STATEMENT OF THE CASE

In early 1982, officers of the Michigan Liquor Control Commission (Commission) became aware that a video draw poker machine was located on the premises of the Sanford Eagles Club. The machine was found to be of the

type prohibited under Michigan law MCL 750.303; MSA 28.535, and the regulations of the Commission, 1980 AACS, R 436.1013.

The video draw poker machine in question is activated by inserting a quarter whereupon one credit point is registered on the machine in the point column. The player then pushes the "play button" and the point column is reduced by one, and the bet column on the machine is increased by one. Next, the "deal button" is pushed and a card appears in each of five windows. The cards are dealt as if from a well-shuffled fifty-two card deck of playing cards. Depending on the cards appearing in the five windows, a player has the option of discarding any of the cards and receiving new cards. The cards are discarded by depressing the "discard button" located under the corresponding card to be discarded. The player may then receive replacement cards by depressing the corresponding "draw button" in an attempt to improve his poker hand. A hand with one pair of aces or better is necessary to win credit points/free replays. If a winning hand is dealt the player, the machine records the appropriate credit points based on the odds programmed into the machine and the number of credit points bet. The player may then play again as many times as he has credit points or, if he does not obtain a winning hand, may insert another quarter.

The video draw poker machine at the Sanford Eagles Club was designed to permit the machine to accumulate more than fifteen replays in the credit column. The machine was also equipped with a key mechanism which could be used to discharge accumulated free replays and a meter to count the number of free replays discharged.

On March 30, 1982, two inspectors from the Commission went to the Sanford Eagles Club and played the video poker machine and won 54 free games. The inspectors

asked the bartender if the games could be traded for cash. The bartender informed them that the Eagles Club did not pay off in cash, but only in free replays.

In May, 1982, the same Commission inspectors returned to the club and played the machine. After this investigation, the officers confiscated the machine as a gambling device and issued a complaint with the Commission against the Sanford Eagles Club for violating its regulation pertaining to maintaining a gambling device, 1980 AACS, R 436.1013.

A hearing was held on the complaint and a decision was made in December of 1982 finding that the machine was a game partly of skill and partly of chance and therefore an unlawful gambling device under MCL 750.303; MSA 28.535 and a violation of 1980 AACS R 436.1013.

The decision was upheld by the Commission on appeal in January, 1983. Following the Commission decision, Automatic Music and Vending Corporation (Automatic Music), who owned the machines and provided them to the Eagle's Club, applied to the Ingham County Circuit Court for an order of superintending control to review the actions of the Commission. The Ingham County Circuit court reversed the Commission and found that free replays did not constitute a reward and therefore the video draw poker machine was not a gaming device prohibited by MCL 750.303; MSA 28.535.

The Court of Appeals affirmed the order of the circuit court and held that the video machine was not a gaming device and further held that MCL 750.303(2); MSA 28.535(2) was unconstitutional on equal protection as well as vagueness grounds.

On November 24, 1986, the Michigan Supreme Court reversed the Court of Appeals finding that a free replay in fact constitutes a reward under the statute. The Court further found that MCL 750.303(2); MSA 28.535(2) does not violate equal protection guarantees nor is it so vague as to be a violation of due process. It is from this decision of the Michigan Supreme Court that Automatic Music and Vending Corporation and the Fraternal Order of Eagles, Sanford Aerie, #3677, appeals to this Court.

ARGUMENT

I

THE EXCLUSION OF A MECHANICAL DEVICE FROM A GENERAL GAMING PROHIBITION BASED ON THE NUMBER OF FREE REPLAYS ALLOWED TO ACCUMULATE ON A MACHINE AT ONE TIME, IS NOT A VIOLATION OF EQUAL PROTECTION GUARANTEES.

There is no dispute that the State has the authority to prohibit or limit gaming devices within its boundaries. (Appellants' Jurisdictional Statement, p 12). *Posadas de Puerto Rico Associates d/b/a Condado Holiday Inn* v *Tourism Company of Puerto Rico*, 478 US ___; 106 S Ct ___; 92 L Ed 2d 266, 283 (1986). The issue is whether the State may exercise that authority by excluding machines from the general gaming prohibition based, *inter alia*, on the number of free replays which may be given by a machine.

MCL 750.303(1); MSA 28.535(1), prohibits a person for hire, gain or reward from maintaining a premises where, among other things, games of skill or chance or partly of skill and partly of chance used for gaming are maintained.

An exception was created in subsection (2) to the general prohibition for a mechanical device which rewarded players through the use of an element of skill if:

1. The machine does not accumulate more than 15 replays at any one time.

2. The free replays accumulated can be discharged only by actually playing the game, and

3. The device makes no record directly or indirectly of free replays awarded.

To be excluded from the general prohibition contained in subsection (1), a machine must meet all three criteria contained in subsection (2).

There is no dispute that the video poker machine did not meet any of the three criteria necessary to be excluded from the general prohibition contained in subsection (1).

Automatic Music's only claim is that the classification of a machine based on the number of free replays is a denial of equal protection. This Court, in *Dandridge* v *Williams*, 397 US 471 (1970), found that a statute did not violate equal protection guarantees just because the classification made by a state was not made with mathematical nicety or because in practice some inequity existed. Further, the Court held that a statute making a classification would not be found to violate equal protection guarantees if any state of facts could reasonably be conceived of to justify the classification. *McGowan* v *State of Maryland*, 366 US 420, 425-427 (1961).

In *McGowan*, the Court dealt with the Maryland Sunday Closing Law. The law was in general a prohibition on all labor, business and other commercial activities on Sunday. The Court found that the statute did not violate equal

protection guarantees because the Legislature could reasonably find that the exempt items and activities were necessary for the health of the populace or for the enhancement of recreational atmosphere of the day, no evidence being in the record to the contrary.

Similarly, in the present case, the Michigan Supreme Court found that the numerical classification created by the Legislature is not unconstitutionally arbitrary, but is reasonably based on the belief that the greater the number of free replays allowed to accumulate on a machine at one time, the greater is the incentive for the owners to make cash payoffs. In the context of licensed establishments selling alcoholic beverages as in the instant case, payoffs could also be made with free drinks. Since the existence of such payoffs may be difficult to prove, and given the limited resources available to investigate claims of payoffs, the Legislature attempted to limit, and at best eliminate, such payoffs on these devices by limiting the number of free replays a machine may accumulate at any one time.

The legislature's method to limit or prohibit gambling is reasonable in light of the goal to be obtained. The statute is, therefore, entitled to a presumption of constitutionality since no evidence to the contrary is contained in the record. This Court should, therefore, dismiss the appeal or affirm the judgment of the Michigan Supreme Court since there is no substantial federal question involved or the issue needs no further argument.

II

THE STATUTORY LANGUAGE CONTAINED IN MCL 750.303; MSA 28.535, IS NOT UNCONSTITUTIONALLY VAGUE.

It is Automatic Music's claim that the language employed in the statute is so vague that it violates due proc-

ess. A reading of the statute shows that it is sufficiently clear and specific to comply with due process criteria. The standard to be used in determining whether due process is violated is whether a statute conveys a sufficiently definite warning that the conduct is illegal. *Grayned* v *City of Rockford*, 408 US 104 (1972) and *Smith* v *Goguen*, 415 US 566 (1974).

The Court in *McGowan* v *Maryland*, *supra*, was faced with a claim of vagueness where the statute exempted from the Sunday Closing Law "merchandise essential to, or customarily sold at, or incidental to the operation of" bathing beaches, or amusement parks. The Court found that business people of ordinary intelligence would be able to determine what the exception included.

MCL 750.303; MSA 28.535, provides in part that a person is guilty of a misdemeanor if that person maintains for hire, gain or reward games of skill or chance or games partly of skill and partly of chance for gaming. While the statute encompasses a wide variety of games, and may be harsh or stringent, that is insufficient basis upon which to find that the statute is vague. *Barsky* v *Board or Regents of New York*, 347 US 442, 448 (1953).

It is clear that maintaining games used for gaming/gambling[1], be they games of skill or chance or partly of skill and partly of chance, are prohibited by the statute. To gamble is readily understood to mean to play for money (cash payoff) or other stakes on the outcome of an event. *Webster's 7th New Collegiate Dictionary*, 1965.

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[1] The terms gaming and gambling under Michigan law are synonymous and used interchangeably and mean to play for a stake or prize. *People* v *Weithoff*, 51 Mich 203, 207-221; 16 NW 442 (1883).

In the instant case, a player puts 25 cents into the video draw poker machine in hopes of receiving a prize or reward of a free replay. The Michigan Supreme Court in *Oatman* v *Port Huron Chief of Police*, 310 Mich 57; 16 NW2d 665 (1944), found that a free replay was a sufficient reward to bring a game within the gaming statute. Clearly, the machine located at the Eagles Club met the criteria for a gaming device under Michigan law.

Nothing in the statute is so vague that a person of common intelligence would not be aware that a machine which gives free replays and does not fall within the exception contained in subsection (2) of the statute is illegal, subjecting the person to misdemeanor charges. The Court should therefore dismiss the appeal of Automatic Music or affirm the Michigan Supreme Court decision since there is no substantial federal question nor is the issue in need of further argument.

CONCLUSION

MCL 750.303; MSA 28.535 was enacted by the Michigan legislature as an attempt to prohibit or limit gambling within the State of Michigan. The basis used for enacting the statute is reasonable and is an appropriate method of addressing the problem of gambling devices within the State of Michigan. Further, the statute is specific and sufficiently clear in its prohibition as well as the exceptions to the prohibition so as not to be unconstitutional.

RELIEF

WHEREFORE, it is respectfully requested that this Court affirm the judgment of the Michigan Supreme Court or, in the alternative, dismiss the appeal of Automatic Music for the reason that there is a lack of a substantial federal question or, that the issue needs no further argument.

Respectfully submitted,

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